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Supreme Court, U.S.
FILED
071251 APR 2 - 2008
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

ANTHONY ALEXANDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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April 2, 2008

QUESTION PRESENTED

Whether a federal Drug Enforcement Agency laboratory report prepared for use in a criminal prosecution is a "testimonial statement" subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

PARTIES TO THE PROCEEDING

The parties below were (1) Anthony Alexander, (2) Alexander's co-defendant George Moon, and (3) the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Anthony Alexander respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

This Petition seeks the review of the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Moon*, reprinted at App. A, 1a-9a, and published at 512 F.3d 359. The court of appeals affirmed the entry of judgment of conviction of the United States District Court for the Northern District of Indiana.

JURISDICTION

The court of appeals entered judgment on January 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Federal Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type

> reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

STATEMENT OF FACTS

On February 28, 2005, a jury found Petitioner Anthony Alexander guilty on four counts of distributing cocaine, one count of distributing marijuana, one count of conspiracy to distribute illegal drugs, and two counts of using his telephone in furtherance of drug dealing. Before the verdict, the district court had instructed the jury that, to find Mr. Alexander guilty of the illegal drug distribution charges, they first had to find that the prosecution had proven, beyond a reasonable doubt, that Mr. Alexander had, in fact, distributed cocaine and marijuana.

The only evidence that the substances that Mr. Alexander had sold and possessed were illegal drugs was a report from a Drug Enforcement Agency (DEA) laboratory, authored by a DEA forensic chemist named Ragnar Olson. The report documented the protocol Olson used to test the allegedly illicit

substances, and it reflected Olson's conclusion that the substances seized from Mr. Alexander were illegal drugs.

The government never called Olson to testify about his report, and Mr. Alexander never had the opportunity to confront Olson about his competence and qualifications, his possible biases and prejudices, his testing methodology, or his conclusions. Instead, the government put a senior DEA forensic chemist, James DeFrancesco, on the stand as an expert witness. *See* Trial Transcript, Excerpted Testimony of James DeFrancesco, attached hereto as App. D, at 17a - 58a.

On direct examination, DeFrancesco testified in response to a question of how he prepared to testify at trial:

> I reviewed [Olson's] paperwork. I reviewed his data and made sure that all his conclusions were supported by the data. Mine were not the first set of eyeballs on his work. It's checked at many levels. And I have full confidence in his ability to carry out his assignment. So I had no reason to believe that his work was not going to be righteous. In my opinion, he did just fine.

(*Id.*, Tr. 5/97, at 18a)

With regard to Government Exhibit 1, a package allegedly containing plant material, DeFrancesco testified that Olson received the package and performed tests to identify the material. (*Id.*, Tr. 5/98-100, at 19a-22a). DeFrancesco testified that the

first test Olson performed was a color test, called the "Ducanoid and Levin Test." (*Id.*, Tr. 5/101, at 23a). DeFrancesco testified that Olson also performed a "microscopic test" where he examined the material under a microscope. (*Id.*) The colloquy continued:

> Q: So Mr. Olson, he was able to form an expert opinion as to the contents of that exhibit?
>
> A: Yes.
>
> Q: What was his expert opinion?
>
> A: That it was marijuana.
>
> Q: Now, after reviewing his notes and the procedures he took and the lab report, are you able to form an expert opinion as to the contents of Exhibit 1?
>
> A: Yes.
>
> Q: And what is your expert opinion?
>
> A: I concur with his in that it was marijuana.

(*Id.*, Tr. 5/103, at 26a).

DeFrancesco testified in a similar manner with regard to several other government exhibits that purportedly contained cocaine. (*Id.*, Tr. 5/109-134, at 27a-56a). He stated that Olson received the exhibit and performed tests to identify the substance and that Olson reached the conclusion that the substance contained cocaine, in either powder or base form. (*Id.*, Tr. 5/109-112, at 27a-30a; Tr. 5/114-116, at 33a-35a; Tr. 5/117-119, at 37a-38a; Tr. 5/119-121, at 39a-

41a; Tr. 5/122-124, at 42a-45a; Tr. 5/131-132, at 54a). With regard to each exhibit, DeFrancesco testified that, after reviewing Olson's notes and conclusions, he "concur[red]" with Olson's conclusions. (*Id.*, Tr. 5/112, at 31a; Tr. 5/116, at 35a-36a; Tr. 5/119, at 38a-39a; Tr. 120, at 39a-40a; Tr. 5/124-125, at 45a-46a; Tr. 5/132, at 54a-55a).

The court entered judgment of conviction against Mr. Alexander on February 28, 2006. On March 1, 2006, Mr. Alexander filed an appeal pursuant to Federal Rule of Appellate Procedure 4(b).

In his appeal, Mr. Alexander argued that the district court erred in allowing DeFrancesco to testify in the place of Olson, who had authored the lab report. Mr. Alexander claimed that this error denied him his Sixth Amendment right to cross-examine and confront Olson, the person who conducted the lab tests and reached the ultimate conclusions that were the only evidence of the nature of the substances seized from Mr. Alexander.

In affirming Mr. Alexander's conviction, the court of appeals held that part of the lab report was "testimonial" under the Sixth Amendment Confrontation Clause, and part was not "testimonial." The court of appeals distinguished between "two kinds of information: the readings taken from the instruments, and Olson's conclusion that these readings mean that the tested substance was cocaine." (App. A at 4a.) Relying on *United States v. Washington*, 498 F. 3d 225 (4th Cir. 2007), *petition for cert. filed*, (U.S. Dec. 14, 2007) (No. 07-8291), the court of appeals also held that the

readings from the instruments were "not 'statements' in any useful sense." (*Id.*) Even if they were "statements," the only "declarant" would be the machine itself, and the court of appeals asked rhetorically, "how could one cross-examine a gas chromatograph?" (*Id.*) Ultimately, the court of appeals held that "DeFrancesco was entitled to analyze the data that Olson had obtained," and that, although "Olson's own conclusions based on the data should have been kept out of evidence," those inferences and conclusions were not harmful to the defendants, because DeFrancesco gave his own expert opinion identifying the substances. (*Id.* at 5a). The court of appeals also asserted that "[a]ny competent chemist" would have reached the same conclusions as Olson. (*Id.* at 4a).

After the court of appeals affirmed the conviction on January 3, 2008, Mr. Alexander filed a motion asking the Court to appoint counsel to file a petition on his behalf for writ of certiorari to this Court. At first, the court of appeals denied Mr. Alexander's motion. Then, on March 17, 2008, this Court granted the petition for writ of certiorari in the case, *Melendez-Diaz v. Massachusetts*, Docket No. 07-591. On Mr. Alexander's motion for reconsideration, the court of appeals reversed itself. On March 18, 2008, the Court, citing this Court's decision to grant certiorari in *Melendez-Diaz*, granted Mr. Alexander's motion for appointment of counsel. *See* Seventh Circuit Order Granting Motion For Reconsideration In Light of *Melendez-Diaz*, attached hereto as App. B, at 10a - 11a.

REASONS FOR GRANTING THE WRIT

By granting the *Melendez-Diaz* petition, this Court has acknowledged the vastly different approaches that State and Federal courts have taken regarding the question of whether scientific laboratory reports are "testimonial" evidence under the Confrontation Clause. The court of appeals advances new theories for why the admission of laboratory reports is not problematic under the Confrontation Clause, and the factual scenario presented in this Petition - where an inadmissible laboratory report is admitted through the alleged "opinion testimony" of an expert witness (who did not perform the tests and "concur[s]" with the conclusions contained in the report) - is a foreseeable shortcut that prosecutors may use in the future to avoid the dictates of the Confrontation Clause. For the sake of comprehensive treatment of the issue, this Court should grant and set this Petition for hearing on the same date as the *Melendez-Diaz* case, or, in the alternative, hold this Petition pending a decision in that case. Further, this Petition is the proper vehicle for addressing these new arguments, because the outcome of *Melendez-Diaz* may compel a reversal or remand to the Seventh Circuit in this case.

I. The *Melendez-Diaz* Petition Established The Importance Of The Federal And State Court Controversy Over Whether Laboratory Test Results Constitute "Testimonial" Evidence Subject To Confrontation Clause Analysis.

By granting the petition for certiorari in *Melendez-Diaz*, this Court acknowledged the importance of the controversy between and among Federal and State courts over whether laboratory test results constitute "testimonial" evidence subject to the Confrontation Clause. Without the right to cross-examine the authors of laboratory reports, and without the benefit of broad discovery as under the rules of civil procedure, defendants are deprived of the opportunity - likely their only opportunity - to "cut superficially impressive scientific evidence down to its proper size." 1 Kenneth S. Broun, MCCORMICK ON EVIDENCE § 203 (6th pract. ed. 2006) (stressing the importance of "[a]ttention to possible infirmities in the collection and analysis of data.")

In 2004, this Court abandoned the substantive reliability standard of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), in favor of a procedural interpretation of the Confrontation Clause that emphasized a criminal defendant's right to cross-examine any witnesses against him. *See Crawford v. Washington*, 541 U.S. 36, 55-56 (2004). Although reliability remained the goal, *Crawford* established that the Confrontation Clause commanded that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. The Court concluded that a cross-examination requirement exists even when

there is no question about the actual reliability of the out-of-court statement, equating the procedural right to confrontation to the procedural right to a jury trial: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because defendant is obviously guilty." *Id.* at 62.

In *Crawford*, this Court declined to define the term "testimonial" specifically or comprehensively. This Court, however, did note "[v]arious formulations" of a "core class" of testimonial statements:

(1) *Ex parte* in-court testimony or its functional equivalent - affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would "reasonably expect" to be used in conjunction with a prosecution,

(2) "extrajudicial statements" contained in "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," (quotation marks omitted) and

(3) statements made "under circumstances [that] would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52.

In *Davis v. Washington*, 547 U.S. 813 (2006), this Court further clarified that statements are "testimonial" when circumstances "objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is

to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

When called upon to apply *Crawford* and *Davis* to scientific evidence, courts across the country have taken diametrically opposed views as to whether such evidence is "testimonial." Some courts have, for various reasons, refused to categorize laboratory reports as "testimonial" statements. *See People v. Geier*, 61 P.3d 104, 139 (Cal. 2007), *petition for cert. filed*, (U.S. Nov. 14, 2007) (No. 07-7770); *see also State v. O'Maley*, 932 A.2d 1, 11-12 (N.H. 2007), *petition for cert. filed*, (U.S. Nov. 7, 2007) (No. 07-7577); *State v. Forte*, 629 S.E.2d 137, 143-44 (N.C. 2006); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005). Other courts have concluded that laboratory reports are "testimonial" under the Confrontation Clause, and that the prosecution should present the authors of those reports for cross-examination by the accused. *See Hinojos-Mendoza v. People*, 169 P.3d 662, 666-667 (Colo. 2007) (laboratory report concluding that substance was cocaine was testimony, for purposes of defendant's right to confrontation), *petition for cert. filed*, (U.S. Feb. 4, 2008) (No. 07-9369); *Roberts v. United States*, 916 A.2d 922, 939 (D.C. 2007) (finding a violation of a defendant's right to confrontation where out-of-court statements of FBI forensic scientists through testimony of DNA expert from FBI's forensic laboratory, although violation later found harmless due to expert's independent analysis); *State v. March*, 216 S.W.3d 663, 665-666 (Mo. 2007) (noting that cases such as *Verde* "incorrectly focus on the

reliability of such reports"), *cert. dismissed*, __ S. Ct. __, 2007 WL 1825157 (Oct. 5, 2007); *State v. Caulfield*, 722 N.W.2d 304, 309-10 (Minn. 2006), *petition for cert. filed*, (U.S. Feb. 1, 2008) (No. 07-9567) (same); *see also City of Las Vegas v. Walsh*, 124 P.3d 203, 207-08 (Nev. 2005) (affidavit of registered nurse who completed blood draw testimonial). As this Court's decision to grant certiorari in *Melendez-Diaz* shows, the question presented is both important and the subject of substantial controversy.

II. This Petition Should Be Granted And Set For Hearing On The Same Date As *Melendez-Diaz* Because The Court Of Appeals Introduces Novel Arguments That Must Be Addressed To Answer Fully The Important Question Presented.

The court of appeals draws a tenuous distinction between the "testimonial" and "non-testimonial" parts of a laboratory report for the purpose of Confrontation Clause analysis. The *Melendez-Diaz* case does not present this Court with this distinction for its review. *See* Pet. for Certiorari in *Melendez-Diaz*, attached as App. C, at 12a - 16a. The *Melendez-Diaz* petition noted that courts finding that laboratory reports testing forensic evidence are not testimonial generally advanced three arguments: (1) that such reports are "akin to a business record," *see Verde*, 827 N.E.2d at 703, (2) that such reports "are neither discretionary nor based on opinion," but rather are the product of "a well-recognized scientific test," *id.* at 705, and (3) that such reports "constitute [the analyst's] contemporaneous recordation of

observable events." *Geier*, 161 P.3d at 139; *O'Maley*, 932 A.2d at 11-12.

Perhaps cognizant that these decisions "erroneously focus on the reliability of the reports and whether the reports fall within the business or public records hearsay exceptions," *see Hinojos-Mendoza*, 169 P.3d at 666, the court of appeals advanced new theories that arguably avoid such criticism. For example, the court of appeals stated that certain readouts on instruments are not "statements," and therefore cannot be "testimonial," that if the data are "statements," the only declarant would be the machines, and that it was not plain error to allow an expert witness to testify as a proxy for the original author of an unsworn, inadmissible laboratory report and to vouch for the accuracy of the work and concur with the conclusions drawn by the original author. (App. A at 3a - 6a.)

This novel analysis, however, ignores the possibility of operator bias, malfeasance, or plain incompetence. Put another way, it presumes the trustworthiness, skill, and reliability of the lab technician, Olson. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 499 (2006) (noting that, on rare occasions, lab technicians have "engage[d] in long-term, systematic, and deliberate falsification of evidence in criminal cases"). As the operator, Olson could have manipulated the machines' outputs; he could have falsified his notes or switched samples. He could have made a mistake and not known it, or attempted to hide it. At least

under the Massachusetts procedure challenged in the *Melendez-Diaz* petition, the lab technicians submit their reports with an affidavit signed under oath. Here, the Government merely had DeFrancesco vouch for Olson and his work. If the greater procedure required by Massachusetts is insufficient under the Confrontation Clause, the lesser procedure employed in this case must fail.

The assumption that laboratory results are somehow self-generating or automatic is itself a dangerous fallacy:

> The possibility of human error exists at every step in the testing process. Samples get mixed up or mislabeled. Many human beings handle the specimen as it goes through a chain of custody. One expert is concerned that '[t]he real room for error is not with the technology but with administrative error. A human being has to pick up the sample and put it in the machine. It may sound trivial but it's not. When the volume of work goes up, the error rate goes up.'

Marianne Heal, *Drug Testing in the Workplace: The Need for Quality Assurance Legislation*, 48 OHIO ST. L.J. 877, 883 (1987); *see also* U.S. Dep't of Justice, *Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report--Samples 6-10*, at 3 (1976) (revealing that 30% of

state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results).

The analysis of the court of appeals also oversimplifies the science behind gas chromatography mass spectrometry, insofar as it presumes that the data output of a machine is a "statement" of the machine itself, and not the operator of the machine. As the dissent noted in *United States v. Washington*, 498 F.3d 225:

> The test results, although computer-generated, were produced with the assistance and input of the technicians and must therefore be attributed to the technicians. For this reason, the majority is mistaken in concluding that "[t]he raw data generated by the diagnostic machines [or computers] are the 'statements' of the machines themselves."

Id. at 232-33 (Michael, J., dissenting).

This Petition should be granted and set for hearing on the same date as the *Melendez-Diaz* case because both cases involve the same important constitutional question as to the applicability of the Confrontation Clause to laboratory reports of forensic evidence, and because this Court should address the additional rationales accepted by the court of appeals to provide a comprehensive answer to the question presented.

III. This Petition Is The Proper Vehicle For Addressing The New Rationales Accepted By The Court Of Appeals Because The Outcome Of The *Melendez-Diaz* Case May Compel Reversal Or Remand In This Case.

Granting this Petition and setting it for hearing on the same date as *Melendez-Diaz* will clarify whether the admission of the Olson laboratory report merits a remand or even reversal in the present case. If the laboratory report contains "testimonial statements," the error of its admission is of constitutional proportion, and the constitutional test means that the Government must show that this error was harmless "beyond a reasonable doubt." *See Chapman v. California*, 386 U.S. 18, 24 (1967). For constitutional errors, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23 (quoting *Fahy v. State of Connecticut*, 375 U.S. 85, 86-87 (1963)). By comparison, for nonconstitutional errors, the harmless-error standard requires a showing of "actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (declining to apply the more onerous *Chapman* standard to habeas petitions). "[T]he standard for harmless-error analysis in *Chapman* is considerably more onerous than the standard for nonconstitutional errors. . . ." *United States v. Lane*, 474 U.S. 438, 446 n. 9 (1986). The court of appeals, having concluded that the "raw data" contained in the (improperly) introduced laboratory report was not "testimonial," apparently applied an incorrect

standard of review for constitutional errors under *Chapman*.

The improper admission of the Olson laboratory report into evidence contributed to the conviction. *First*, the evidence, by its nature, was compelling. Studies have shown that juries are swayed by what has been dubbed the "CSI Effect," after the popular TV show where crime-scene investigators use scientific techniques to solve murders and other crimes. *See* Andrew P. Thomas, *The* CSI *Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70 (2006), http://www.thepocketpart.org/2006/02/thomas.html. The chief prosecutor for Maricopa County, Arizona, Mr. Thomas, stated:

> Our prosecutors frequently talk to jurors after their verdicts about the cases they just decided. On the basis of these conversations with juries, 74% of our prosecutors maintained that they have prosecuted a case in which the jury "expected to be presented with scientific evidence," and that when both scientific and nonscientific evidence existed, 45% of our prosecutors felt "the jury focused so much on presented scientific evidence that they paid too little attention to unscientific evidence" like witnesses and police testimony.
>
> In one drug case, the officer saw the defendant throw down a baggie of drugs. The baggie was not fingerprinted by the time of trial because there was a backlog

> for laboratory testing that was up to six months. As Deputy County Attorney Kristen Knudsen explained: "After the trial, the jury complained that the lack of fingerprint evidence suggested that the baggie could have been there all along."

Id.

In other words, laboratory reports are superficially impressive to juries, and juries may be inclined to accept such reports uncritically. The right to cross-examine the proponent of such evidence thus becomes very important.

Second, there should have been a presumption that the admission of the laboratory reports in this case was prejudicial. Federal Rule of Evidence 703 provides that "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Ev. 703. Moreover, "[w]hen inadmissible evidence used by an expert is admitted to illustrate and explain the expert's opinion, however, it is 'necessary for the court to instruct the jury that the [otherwise inadmissible] evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence.'" *See United States v. 0.59 Acres of Land*, 109 F. 3d 1493, 1496 (7th Cir. 1997) (quoting *Paddack v. Dave Christensen, Inc.*, 745 F. 2d 1254 (9th Cir. 1984)). These rules suggest that

prejudice should have been presumed in their breach.

Third, there was actual prejudice in this case. The court of appeals' conclusion that any error in admitting the laboratory report into evidence was harmless is based on the notion that the report was merely cumulative of DeFrancesco's allegedly independent expert testimony. The Constitution, however, cannot permit an end-run around the Confrontation Clause by using expert witnesses to "summarize out-of-court statements made by others." *United States v. Lawson*, 653 F.2d 299, 302 (7th Cir. 1981). Nor should the Court permit expert witnesses to vouch for the out-of-court statements made by others and repackage them as their own independent judgment.

As the transcript repeatedly shows, DeFrancesco was not providing his own independent opinion, but was "concur[ring]" with the conclusions reached by Olson in Olson's report. (App. D, Tr. 5/112, at 31a; Tr. 5/116, at 35a-36a; Tr. 5/119, at 38a-39a; Tr. 120, at 39a-40a; Tr. 5/124-125, at 45a-46a; Tr. 5/132, at 54a-55a) The Government, perhaps realizing the inadequacy of DeFrancesco's testimony, belatedly attempted to recharacterize what he was saying, asking: "[W]hen you say you concur with [Olson's] conclusion, you're saying that [the exhibit], in your expert opinion, is cocaine hydrochloride?" (*Id.*, Tr. 5/119, at 39a). Given DeFrancesco's repeated reference to Olson's conclusions as the basis for his own, it would be impossible for anyone to discern where Olson's conclusions end and DeFrancesco's

independent judgment (if any) begins. Thus, DeFrancesco's testimony does not render harmless the admission of Olson's report into evidence.

This Petition should be granted and set for hearing on the same date as *Melendez-Diaz*, or held pending the decision in that case, because if laboratory reports prepared for the prosecution are the testimonial statements of their authors, the court of appeals must revisit the question of whether the admission of the laboratory report without first requiring the testimony (and cross-examination) of Olson was harmless beyond a reasonable doubt under the Confrontation Clause.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for writ of certiorari and set it for hearing on the same date as *Melendez-Diaz v. Massachusetts*, Docket No. 07-591, or in the alternative, hold it pending a decision in that case.

Respectfully submitted,

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April 2, 2008

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.

GEORGE MOON and ANTHONY ALEXANDER,
Defendants-Appellants.

No. 2:04-CR-71-Rudy Lozano, Judge.

Argued September 13, 2007
Decided January 3, 2008

Before EASTERBROOK, Chief Judge, and CUDAHY and SYKES, Circuit Judges.

EASTERBROOK, Chief Judge.

Anthony Alexander and George Moon have been convicted of distributing cocaine and of some ancillary crimes. *See* 21 U.S.C. §841. Alexander received a sentence of life imprisonment and Moon of 190 months. The principal question on appeal is whether a chemist violated the Confrontation Clause of the Sixth Amendment when testifying that the substance seized from defendants was cocaine.

James DeFrancesco, a chemist employed by the Drug Enforcement Agency, testified that the substance was cocaine. He based this conclusion on the output of two machines: an infrared spectrometer and a gas

chromatograph. DeFrancesco did not perform the tests himself, the lab work had been done by Ragnar Olson, a chemist who left federal employment three weeks before trial. Olson had just started at law school and did not want to interrupt his legal education. So DeFrancesco testified, using the instruments' output, a report that Olson had prepared, and Olson's lab notes (which persuaded DeFrancesco that Olson had prepared the samples and run the tests correctly). Defendants did not object to DeFrancesco's testimony, or the introduction into evidence of Olson's report, other than on the ground that the tested samples' chain of custody was faulty. On appeal, however, they abandon the chain-of-custody point and contend that using Olson's work in any way violates the Confrontation Clause. The lack of an objection means that appellate review is limited to plain error.

Crawford v. Washington, 541 U.S. 36 (2004), holds that the Confrontation Clause entitles defendants in criminal cases to block the use of testimonial statements by persons who are not available for cross-examination at trial. Phrasing *Crawford's* rule as an entitlement, rather than an unconditional command to the court, is important. Hearsay usually is weaker than live testimony, and defendants may prefer the hearsay version rather than making an objection that would compel the prosecution to produce a stronger witness. If a confrontation-clause objection had been made and granted in this case, for example, the result would have been the appearance of Olson on the stand, and then defendants would have been worse off than they were with DeFrancesco for defense counsel could

undermine DeFrancesco's testimony by reminding the jury that he had not done any of the work and that flaws in Olson's procedures may have been omitted from the lab notes. That it may be to defendants' advantage to accept the hearsay version of evidence makes it problematic to entertain a *Crawford* claim via the plain-error clause of Fed. R. Evid. 103(d). A defendant who sincerely wants live testimony should make the demand, so that the declarant can be produced. The lack of a demand for testimony by an available declarant leads to the conclusion that the appellate argument is strategic rather than sincere.

We need not pursue that subject, however, because there was no problem with DeFrancesco's testimony. He testified as an expert, not as a fact witness. When an expert testifies, "the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R. Evid. 703. So if the Confrontation Clause precludes admitting Olson's report, this does not spoil DeFrancesco's testimony. *See United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007). (Litigants may insist that the data underlying an expert's testimony be admitted, *see* Fed. R. Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause.)

Because defendants failed to make the right objection, Olson's report was received in evidence. And some of his report is indeed testimonial in nature. The report has two kinds of information: the readings taken from the instruments, and Olson's conclusion that these readings mean that the tested

substance was cocaine. The latter is testimonial as the Supreme Court used that word in Crawford and more recent decisions, such as *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006). Davis says that a statement is testimonial if it was made without an ongoing emergency, and "the primary purpose of the interrogation [or statement] is to establish or prove past events potentially relevant to later criminal prosecution." 126 S. Ct. at 2274 (footnote omitted). A chemist's assertion that "this substance was cocaine" meets the Davis definition.

DeFrancesco reached on the stand the same conclusion that appeared in Olson's report. Defendants do not say that Olson's evaluation could have played any role in the jury's deliberation. Instead they are concerned about the readings taken from the instruments, because those readings are the problem for the defense. Any competent chemist would infer from these data that the tested substance was cocaine. Yet the instruments' readouts are not "statements", so it does not matter whether they are "testimonial." That's the holding of *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007).

A physician may order a blood test for a patient and infer from the levels of sugar and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not "statements" in any useful sense. Nor is a machine a "witness against" anyone. If the readings are "statements" by a "witness against" the defendants, then the machine must be the declarant. Yet how could one cross-examine a

gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests. That is one reason why Rule 703 provides that the expert's source materials need not be introduced or even admissible in evidence. The vital questions–was the lab work done properly? what do the readings mean? –-can be put to the expert on the stand. The background data need not be presented to the jury.

Thus we agree with *Washington* that the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself. Our decision in *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006), is to much the same effect-though it does not involve expert analysis. A hospital conducted blood and urine tests that were introduced into evidence as the hospital's business records. *See* Fed. R. Evid. 803(6); see also Rule 803(4). Then the arresting officer testified that the results demonstrated the presence of methamphetamine in Ellis's system. Ellis holds that the test results were not "testimonial" under Crawford and Davis. 460 F.3d at 923-24. We did not consider the possibility that the data are not "statements" in the first place. Thus Washington and Ellis reach the same result: the Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial.

DeFrancesco was entitled to analyze the data that Olson had obtained. Olson's own conclusions based on the data should have been kept out of evidence (as doubtless they would have been, had defendants objected). Still, given DeFrancesco's live testimony

and availability for cross-examination, Olson's inferences and conclusions were not harmful to the defendants.

Defendants raise many other issues, but the only one that requires discussion is whether the evidence supports the jury's verdict that Alexander and Moon conspired to distribute cocaine. They depict their transactions as those of commercial buyer and seller, rather than as a conspiracy, which means an agreement to commit a future crime. *See United States v. Lechuga*, 994 F.2d 346 (7th Cir. 1993) (en banc). Why this issue should arise at all is hard to understand. Both defendants were convicted of actually distributing cocaine. The penalty for conspiracy to distribute drugs is no greater than the penalty for a substantive offense and may be less. (Alexander was sentenced to life in prison for one of his substantive offenses, and to 120 months for another, to run concurrently with 120 months for the inchoate crime; Moon received 190 months, concurrent, for both substantive and inchoate offenses. Alexander's sentence is higher because of his extensive criminal history, use of a weapon, and obstruction of justice; none of those enhancements is contested.)

Adding a conspiracy charge does little but complicate the trial and appeal. Some prosecutors may believe that they need to charge conspiracy in order to take advantage of the co-conspirator exception to the hearsay rule, see Fed. R. Fvid. 801(d)(2)(E), but that's a mistake. This rule of evidence depends on principles of agency, so it applies (if the evidence demonstrates agreement by a preponderance, *see*

United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990) (en banc)) whether or not the indictment has a conspiracy count. *See United States v. Gil*, 602 F.2d 546, 549 (7th Cir. 1979). Only the $100 special assessment for the conspiracy conviction is at issue, and it is hard to imagine that the prosecutor charged, tried, and briefed appeals on this issue for less than $200 (one assessment per defendant). The value of judicial time devoted to this question greatly exceeds $200. But here we are, and after *Ray v. United States*, 481 U.S. 736 (1987), a court of appeals can't use the concurrent-sentence doctrine to bypass the issue.

A judge authorized a wiretap of Alexander's phone so that agents could track down the source of the drugs he was selling. (They had lots of evidence that Alexander was dealing in cocaine and marijuana.) Agents heard Alexander talk to Moon, and the familiarity with which they spoke implied that they had been doing business for some time. During one conversation Moon said: "what I intend to do is to give you enough to have four, five, or six meals if that's open for you and then when I come back the following to see you is that you and I need to schedule some time to have some lunch." An agent interpreted this for the jury as a promise to deliver between 4 and 6 kilograms of cocaine ("meals"), with some or all of the payment deferred (so that "schedule some time to have some lunch" meant "set up a time for you to pay me"). The district judge did not abuse his discretion in allowing the agent to testify as an expert about the meaning of elliptical phrases that are designed to make conversations sound innocent to any third party who may be

listening; Moon was not running a Meals-on-Wheels service.

When agents stopped a car that Moon was driving, they found 28 packages of cocaine, each holding a kilogram, and about $60,000 in cash, some $6,000 of which could be traced to payments that an informant had made to Alexander. Moon later called Alexander and tried to set up a time for Alexander to pay the rest of what he owed. A jury could conclude from this (and the references to "lunch") that Moon had been fronting cocaine to Alexander, who paid for some or all of each delivery only after reselling the inventory. The agents kept a watch on Alexander and Moon, who soon met; Alexander handed over $20,000. (A jury could find that the money came from Alexander, who was seen giving Moon something before driving away.)

Defendants acknowledge that they dealt in cocaine but say that buying and selling drugs differs from conspiracy. That's true enough in principle, as Lechuga holds, but often the same evidence that shows particular transactions may support an inference that the parties have agreed to commit future crimes together, and thus have conspired. *See United States v. Nubuor*, 274 F.3d 435 (7th Cir. 2001); *United States v. Hach*, 162 F.3d 937 (7th Cir. 1998). That's so here–not only because the recorded conversations imply that Alexander and Moon had been working together but also because a jury could infer that Moon ex ended credit to Alexander. Credit transactions make the parties co-venturers; Moon would profit only if Alexander committed a future crime (the sale of the fronted drugs) and paid

him back. The jurors were told that they had to distinguish normal sales from conspiracy; defendants do not question the terms of those instructions. The evidence was sufficient to allow a reasonable jury to infer that Moon and Alexander were joint venturers.

AFFIRMED

A true Copy:
Teste:

/s/
Clerk of the United States Court of Appeals, Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,
No. 06-1840
v.
ANTHONY ALEXANDER, Defendant-Appellee.

No. 04 CR 71

Rudy Lozano, Judge.

Before FRANK H. EASTERBROOK, Chief Judge

MOTION FOR RECONSIDERATION OF MOTION TO APPOINT COUNSEL TO PREPARE PETITION FOR WRIT OF CERTIORARI FOR APPELLANT,

Filed March 14, 2008

In light of the Supreme Court's decision to grant certiorari in *Melendez-Diaz v. Massachusetts*, No. 07-591 (Mar. 17, 2008), which presents a question related to one of the issues in this appeal, the court concludes that Alexander should have the benefit of counsel to consider filing a petition for certiorari. The motion to reconsider is accordingly granted, and counsel will be appointed under the Criminal Justice Act.

Alexander must understand, however, that the appointment of counsel differs from an entitlement to have counsel file a petition for certiorari. Review by the Supreme Court is discretionary. Counsel

must use his best professional judgment to decide whether the probability of that the Supreme Court will decide to hear Alexander's case is sufficiently high to justify a petition.

APPENDIX C

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Luis E. Melendez-Diaz, Petitioner,
v.
Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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October 26, 2007

* * * *

2. None of the three rationales that the Massachusetts Supreme Judicial Court and other courts have invoked to characterize forensic examiners' laboratory reports as nontestimonial

provide any reason to retreat from this straightforward application of the Confrontation Clause.

a. The Massachusetts Supreme Judicial Court held that forensic reports identifying controlled substances are not testimonial in part based on the supposed reliability of such scientific tests, reasoning that they are "neither discretionary nor based on opinion." *Verde*, 827 N.E.2d at 705, App. 16a; *see also Dedman*, 102 P.3d at 636 (finding forensic reports nontestimonial because "the process (of their creation] is routine, non-adversarial, and made to ensure an accurate measurement"); *Forte*, 629 S.E.2d at 143 (same). This is nothing more than *Roberts redux*. Even if these courts' assessment of the reliability of forensic testing were correct, but *see supra* at 16-17, this Court expressly rejected such legal reasoning in *Crawford*. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. at 62. Defendants have a right to insist that prosecutorial testimony be presented through the adversarial process, regardless of whether judges surmise that cross-examination would likely bear fruit.

b. Nor does *Crawford's* reference to business records support deeming forensic reports nontestimonial. The common law "shop book rule" exception for regularly kept business records, to *which Crawford* adverted, see 541 U.S. at 56, did not remotely encompass reports generated for prosecutorial use. *See Palmer v. Hoffman*, 318 U.S.

109, 113-14 (1943) (explaining that records "calculated for use essentially in the court" or whose "primary utility is in litigating" fall outside of common law rule, and declining to expand federal exception to allow their admission); *State v. Miller*, 144 P.3d 1052, 1058-60 (Or. Ct. App. 2006) (tracing history of business records exception and concluding that state crime laboratory reports fall outside historical exception). Even as recently as the 1970s, the drafters of the Federal Rules of Evidence declined to expand the "public records" exception in criminal cases to include "matters observed by police officers and other law enforcement personnel" and "factual findings resulting from an investigation." Fed. R. Evid. 803(8). They took this action "in view of the almost certain collision with confrontation rights which would result from [such records'] use against the accused in a criminal case." Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972). *See generally United States v. Oates*, 560 F.2d 45, 68-73 (2nd Cir. 1977).

It makes no difference that some jurisdictions, such as Massachusetts, have since decided to characterize laboratory reports as "akin to business records, 827 N.E.2d at 702, App. 12a, or that others have gone so far as to expand their statutory definitions of business records expressly to include state crime laboratory reports. As this Court emphasized in *Crawford*, the reasons for subjecting testimonial statements to confrontation procedures "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. In other words,

"*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Id.* at 51. Accordingly, jurisdictions may no more insulate state crime laboratory reports from confrontation scrutiny by labeling them business records as they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct in their ordinary course of business.

c. Finally, this Court's decision in *Davis* does not support courts' attempts to classify laboratory reports as nontestimonial on the ground that they are "contemporaneous recordation[s] of observable events." *Geier*, 161 P.3d at 139. *Davis* involved a drastically different scenario than is at issue here-namely, a crime victim calling 911 in the midst of an ongoing emergency. To the extent that timing matters in that context, *Davis* holds that a declarant's statements are nontestimonial when they narrate threatening, criminal events while they are actually happening. Nothing in that decision suggests that a state official's formalized description of evidence that police seized days or weeks before is not testimonial, especially when the forensic report's express purpose is to build a case for prosecution.

The crux of *Davis*, like *Crawford* before it, is that statements gathered for "the primary, if not indeed the sole, purpose of ... investigat[ing]" a past crime are testimonial. *Davis*, 126 S. Ct. at 2278; see also *id.* at 2273-74; *Crawford*, 541 U.S. at 53 (statements obtained by police officers serving an "investigative and prosecutorial function" are testimonial). That is

the undeniable purpose of sworn forensic reports. This Court should not wait any longer to make clear that the Confrontation Clause applies to such evidence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,	) DOCKET NO.:
	) 2:04-CR-71 RL
PLAINTIFF,	) APPEAL NO.:
	)
VS.	) THURSDAY,
	) FEBRUARY 24,
	) 2005
GEORGE MOON AND	) 12:00 P.M.
ANTHONY ALEXANDER,	)
	) JURY TRIAL
DEFENDANTS.	) VOL. 5, PGS. 1-212

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUDY LOZANO
U.S. DISTRICT COURT JUDGE
AND A JURY

APPEARANCES:

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For Defendant Alexander: Anthony Alexander, Pro Se

For Defendant Alexander as Standby Counsel:	Charles E. Stewart, Jr. 8396 Mississippi St., Ste. G Merrillville, IN 46410 (219) 736-5555
For Defendant Moon:	Mr. Jerry T. Jarrett, Esq. Robert L. Lewis & Associates 2148 W. 11th Avenue Gary, Indiana 46404 (219) 944-2755

* * * *

Tr. 5/97

Q. In order to prepare for testifying in this trial, what, if anything, could be done?

A. I reviewed his paperwork. I reviewed his data and made sure that all of his conclusions were supported by the data. Mine were not the first set of eyeballs on his work. It's checked at many levels. And I have full confidence in his ability to carry out his assignment.

So I had no reason to believe that his work was not going to be righteous. In my opinion, he did just fine.

Q. Did you look just at his lab results, or did you also look at his notes?

A. The notes and the data, yes, I did.

MR. NOZICK: May I approach the witness, Judge?

THE COURT: You may.

MR. NOZICK: Yes, sir, would you like some water?

BY MR. NOZICK:

Q. Are you okay, sir?

A. Sure.

Q. I'm handing you what's been marked as Government's Exhibit 1, three pounds -- strike that -- Government's Exhibit 1.

Do you recognize that exhibit?

A. Yes, I do.

Q. How is it that you recognize that?

A. I recognize it by the seals and Mr. Olson's signature in

Tr. 5/98

at least one location.

Q. Do you see the DEA lab number on that?

A. Yes, I do.

Q. Is that 157569?

A. That's correct.

Q. Do you see Mr. Olson's name on it?

A. Yes, I do.

Q. Is there a date on that, the date he would have opened that and tested that?

A. The date opened was June 9th of 2004.

Q. Now, by looking at the exhibit, can you tell when and where this would have been received into the lab, or just the

date that it's tested?
A. Received into the laboratory -- the information is
typically not on the evidence itself. I would have to take a
look at additional paperwork.
Q. But you know the date that it was opened and tested?
A. Yes.
Q. Now, did Mr. Olson make notes for this, or just write
down the lab report?
A. There were handwritten notes.
Q. Now, is that typical to make handwritten notes when
you're testing an item?
A. It's required.
Q. It is required. So any time you test an item, you make

Tr. 5/99

handwritten notes on it?
A. We have to handwrite all our notes.
Q. Have you had an opportunity to review Mr. Olson's notes?
A. Yes, I have.
Q. Could you tell from the notes what the condition of that
drug exhibit, Government's Exhibit 1, was when Mr. Olson first
received it?
A. Yes.
Q. What is that condition?

A. If I could refer to the notes. It came in one heat-sealed evidence envelope like this, and there were three packages within here, each of them plastic containers -- or plastic pouches.

Q. And can you tell from the notes if there had been any signs that he marked down that the contents of the exhibit were tampered with or altered before he received the exhibit?

A. No. There was a -- I have witnessed the description, and -- which meant that there may have been some minor difference in the description on the paperwork -- on the incoming paperwork and mine. But without that paperwork in front of me, I don't know what the nature of that discrepancy might have been.

Q. Can you tell from the notes what you first did with the exhibit?

The first thing he did, as I would do, is to weigh the

Tr. 5/100

exhibit and check the gross weight, the entire weight of the

packaging, the green plant material and everything together.
And check that against the original DEA 7 Form, which has a
gross weight on it.
Q. Sometimes are there small inconsistencies between the
weight when you weigh it, and the weight when the DEA agents
weigh it?
A. Sure.
Q. Is that a yes?
A. Yes.
Q. Are those DEA agents scientists, to your knowledge?
A. No.
Q. And did he open that package?
A. Yes, he did.
Q. Did he perform any tests on that package of the suspect
marijuana?
A. He performed several tests.
Q. Can you please briefly explain what these tests are to
the jury?
A. When materials like this come in in multiple packages,
what we have to do is we have to screen the packages -- the
contents of the packages to find out if they're essentially the
same material. And then once we establish that they are the
same, then we join them together and form a composite and then

25 continue our testing from there. And that's what Mr. Olson

Tr. 5/101

1 did.
2 Q. Are there certain names of actual tests that you would do
3 on marijuana?
4 A. Sure. The first test he performed was called a modified
5 Ducanoid and Levine. (ph)
6 Q. Now, can you put that in laymen's terms what that entails
7 without making it too sciencey?
8 A. Well, I think Ducanoid and Levin were probably the two
9 scientists who came up with the test. And it's a color test.
10 And what it does is it will turn a solution blue, if it's a
11 positive blue or purple, if it's a positive. And in this case,
12 it did and it was positive for all three bags.
13 Q. Okay. And are there any other tests that would have been
14 performed on this one?
15 A. It also appears that on each of them he performed a
16 microscopic test where you just simply take the plant material
17 and look at it under the microscope, and look to identify
18 certain features of the plant.

And something like marijuana has very unusual features, unique features. And that's what he identified, those features. And so that would have been a positive for his conclusion.

Q. And are there any other tests that were done on the marijuana?

A. Then at that point until the screening -- he was

Tr. 5/102

satisfied with the screening, indicated that all three were the same, he would combine the three together and form a composite and then do a confirmatory test on top of that. And that one identified a controlled substance within marijuana that is quite typical of marijuana itself. That's called Delta 9 THC.

Q. Is that actually Cannabis or marijuana, or is it a different drug?

A. It's a drug that is produced by the marijuana plant. And it's one of the most active components in the marijuana.

Q. And that's a controlled substance under the Controlled Substance Act?

A. It's a controlled substance all by itself. But then marijuana is also a controlled substance.
Q. What schedule controlled substance is marijuana?
A. Marijuana is a Schedule I Controlled Substance.
Q. Now, these tests that were performed on Government's 1, are those the standard tests that would be performed in your lab on suspect marijuana?
A. Yes.
Q. Are those the same tests that you had performed on that marijuana -- suspect marijuana, if you had conducted them yourself?
A. Yes.
Q. Can you tell from the notes and/or the lab report what the results were on the tests on Government's Exhibit 1?

Tr. 5/103

A. That the results were positive for marijuana. And so the conclusion was marijuana.
Q. And was the substance weighed?
A. Yes.
Q. What was the weight?
A. The net weight of the plant material within all the packaging was 1,326 grams.

Q. Are you good with math between pounds and grams?
A. Not bad.
Q. Roughly, how many pounds is that?
A. One pound is 455 grams, so you're looking at approximately three pounds.
Q. So Mr. Olson, he was able to form an expert opinion as to the contents of that exhibit?
A. Yes.
Q. What was his expert opinion again?
A. That it was marijuana.
Q. Now, after reviewing his notes and the procedures he took and the lab report, are you able to form an expert opinion as to the contents of Exhibit 1?
A. Yes.
Q. And what is your expert opinion?
A. I concur with his in that it was marijuana.
Q. And on what do you base that opinion?
A. On the data that he acquired and his handwritten notes,

Tr. 5/104

and on just my visual observations of the material itself.
Q. Okay. After his analysis, do you know what he did with this exhibit?
A. He packaged it back up and turned it back into the main

vault.
Q. Okay. And you have that in front of you today. Do you
see Mr. Olson's initials still on it?
A. The evidence itself?
Q. Yes.
A. Yes.
MR. NOZICK: At this point the government would move
to introduce what's been marked as Government's Exhibit 1.
THE COURT: Any Objection?
MR. JARRETT: None by Defendant Moon.
DEFENDANT ALEXANDER: None.
THE COURT: It's admitted.
(Government's Exhibit 1 received in evidence.)

* * * *

Tr. 5/109

THE COURT: Mr. Nozick, you may continue with your
examination.
MR. NOZICK: Thank you, your Honor. May I approach
the witness again?
THE COURT: You may.
DIRECT EXAMINATION (CONTINUED)
BY MR. NOZICK:
Q. Mr. DeFrancesco, I'm handing you what has been marked as
Government's Exhibit 3. Do you recognize that?
A. Yes, I do.
Q. What is that exhibit?

Tr. 5/110

A. This is as it came into our laboratory, Exhibit No. 21, it's now marked Government's Exhibit 3, and it has a unique laboratory number to it.

Q. And does it have your DEA lab number 157744 on it?

A. That's correct.

Q. That's a different lab number than the other items that we've looked at, is that correct?

A. Yes.

Q. They each have their own lab number, is that accurate?

A. That's correct.

Q. Can you tell by looking at the exhibit when and where Mr. Olson received it?

A. He received the exhibit -- I'd have to take a look at his paperwork -- he received the exhibit on June 21st of 2004.

Q. Have you had the chance to look at his notes for this exhibit?

A. Yes.

Q. Can you tell from the notes the condition of the drug exhibit when he received it?

A. The condition of the drug exhibit was one heat-sealed envelope containing a clear Ziploc bag, containing a clear

22 unknotted Ziploc bag, containing a white powder substance.
23 Q. Could you tell from his notes if there were any signs
24 that this exhibit had been tampered with before he received it?
25 A. None, the seals were intact.

Tr. 5/111

1 Q. Could you tell from his notes what he did with this
2 exhibit?
3 A. As in the previous exhibit, he had taken a gross weight
4 of the package, compared it to the gross weight on the DEA 7,
5 and then proceeded with his analysis.
6 Q. Now, this piece of evidence, this suspect marijuana,
7 which we now know as marijuana and this suspect cocaine, are
8 the same tests done on it?
9 A. Not exactly the same tests. The first few tests -- or
10 actually it looks like two tests were run on this. The first
11 test is different than what you would run on the marijuana.
12 Q. Okay. What are the tests that were run on this cocaine?
13 A. The two tests that were run on here, the first one is
14 known as IR, which is infrared spectrophotometry. And that was

used to do an initial identification. And then a second confirmatory test as was done with the prior exhibit was known as -- is known as GCMS, which stands for gas chromatography mass spectrometry.

Q. Are these the standard tests that are performed in your lab to determine the chemical analysis in the exhibit?

A. Yes, indeed.

Q. And these tests that Mr. Olson performed on this exhibit, are these the same ones that you would have done, if you were the initial chemist?

A. Most definitely.

Tr. 5/112

Q. Could you tell from the notes or the lab report, what were the results of the test?

A. The results were cocaine hydrochloride and caffeine.

Q. Now, when you say cocaine hydrochloride, what does that mean?

A. It's more commonly known as powder cocaine.

Q. And was the substance weighed?

A. Yes.

Q. What was the weight of it?

A. The net weight of the substance was 125.0 grams.
Q. Now, when you say net weight, is that without packaging?
A. That's correct.
Q. Now, was Mr. Olson able to form an expert opinion as to what the contents of this exhibit were?
A. Again, cocaine hydrochloride and caffeine.
Q. Were you able to form an expert opinion as to the contents of this exhibit?
A. As I did before after reviewing his paperwork, I concur.
Q. Okay. So your expert opinion is also that this is powder cocaine or cocaine hydrochloride?
A. Based on his results, yes.
Q. After it was analyzed, do you know what he did with the exhibit?
A. Packaged it up as in the prior exhibit and returned it to the main vault.

Tr. 5/113

Q. Okay.
A. And submitted his report.
Q. Does he reseal it first?
A. Reseals it, yes.
Q. Does he initial it?
A. Yes.
Q. Do you see his initials on it?

A. Yes, I do.
Q. And his seal?
A. Yes. Well, let me back up a little bit. When the evidence comes in, typically it will have just one seal at the top, and have three factory seals. And then when the chemist opens it up, we maintain the agent's seal on the top and we cut at the bottom so that when the evidence is done with the chemist, you'll see two seals, a seal at the top and a seal at the bottom. And we even maintain the strip that we used to cut -- that we cut off. And that strip is inside here, it's between some of the bags.
Q. Okay.
MR. NOZICK: At this time the government will move into evidence what's been marked as Exhibit 3.
THE COURT: Any objection?
MR. JARRETT: No, your Honor.
DEFENDANT ALEXANDER: No.
THE COURT: It's admitted.

Tr. 5/114

(Government's Exhibit 3 received in evidence.)
MR. NOZICK: May I approach the witness?
THE COURT: You may.

BY MR. NOZICK:

Q. Mr. DeFrancesco, I'm handing you what's been marked as Government's Exhibit 4. Do you recognize that exhibit?

A. Yes, I do.

Q. What is that exhibit?

A. This is as it came into the laboratory, Exhibit Number 22, it's now Government's Exhibit 4, and it has the laboratory number 157962.

Q. Have you had the chance to look at that exhibit before today?

A. Yes, I did.

Q. And by looking at the exhibit, can you tell when and where Mr. Olson received it?

A. Again, referring back to his paperwork, he received it on July 7th of 2004.

Q. Did Mr. Olson also do notes for this case, in addition to his lab report?

A. As he did with the previous, yes.

Q. Have you had the opportunity to review his notes for this exhibit?

A. Yes, I did.

Q. Could you briefly tell the jury what the tests were --

strike that. Did he perform the same tests on this as he performed on the last exhibit, which was also suspect cocaine?

A. He performed the same two tests as the prior exhibit. However, he also performed a screening test, which is a color test somewhat similar to the test that was performed on the very first exhibit that was the suspect marijuana where a solution will go from one color to another, if it's positive for, in this case, cocaine.

Q. Can you tell from his notes what his expert opinion was and his lab report what his expert opinion was as to what Government 4 consists of?

A. That it contained cocaine base at a purity of 60 percent.

Q. Now, when you say cocaine base, does that have a street name of crack cocaine?

A. Yes, it can.

Q. So the test results for cocaine base, are they different from the test results for cocaine hydrochloride? Or -- if I could rephrase that? Could you tell from your tests whether something is powder cocaine or crack cocaine?

A. In the laboratory we can identify what we determine as the salt form. So cocaine base is the parent compound, and cocaine hydrochloride is the salt form of cocaine.

Q. And does that Exhibit 4 have a slightly different appearance than the powder cocaine we've seen previously?

A. Yes.

Tr. 5/116

Q. And how is the appearance of it different?

A. It's fairly typical of cocaine base. Sometimes it can come in as lily white. This is on the tannish side. It's chunky and looks like it's still wet, which would account for the fact that the purity is only 60 percent. Probably a good deal of the rest of the purity is devoted to water. And it comes in just small, small sort of chunks.

Q. After looking at Mr. Olson's notes and lab reports, are you, yourself, able to form an expert opinion as to the contents of Exhibit 4?

A. Yes.

Q. What is your opinion as to the contents?

A. I concur with Mr. Olson that it was cocaine base.
Q. So your opinion is that -- your expert opinion is that's
crack cocaine or cocaine base in Government's 4?
A. That it's cocaine base, correct.
Q. And after he analyzed it, did he reseal it?
A. He resealed it as he did the previous ones, placing his
seal on the bottom, so you see the agent's seal and his seal.
And then all of his packaging with it.
MR. NOZICK: At this point the government will move
into evidence what's been marked as Government's Exhibit 4.
THE COURT: Any objection?
MR. JARRETT: None, your Honor.
DEFENDANT ALEXANDER: None.

Tr. 5/117

THE COURT: It's admitted.
(Government's Exhibit 4 received in evidence.)
BY MR. NOZICK:
Q. Just to clarify, could you tell what the weight was of
that last exhibit?
THE COURT: You're talking about Government's Exhibit
4?
MR. NOZICK: Government's Exhibit 4, correct.

THE WITNESS: For Government's Exhibit 4, the net weight was 124.7 grams.

BY MR. NOZICK:

Q. Okay. And you said that your expert opinion is that that is cocaine base. Is that commonly known as crack cocaine?

A. Cocaine base can be known as crack cocaine, and crack cocaine is cocaine base typically in a chunky form. So that's consistent.

Q. Thank you.

MR. NOZICK: May I approach again, Judge?

THE COURT: You may.

BY MR. NOZICK:

Q. I'm handing you Government's Exhibit 5 -- or I handed it to you already. Do you recognize that?

A. Yes, I do.

Q. Does that have the DEA lab number on it of 158070?

A. Yes, it does.

Tr. 5/118

Q. Does it have Mr. Olson's notes on it or his name on it?

A. It has his seal at the bottom.

Q. And his name or initials or signature?

A. His name and the other information for the case.

Q. Have you had the opportunity to look at his notes for that item?
A. Yes, I have.
Q. Did he conduct the same tests on that as he did on the other cocaine exhibits?
A. Yes, he did. Pretty much identical to the previous exhibit, Government's 4.
Q. Okay. And have you had the opportunity to look at his lab report and his notes?
A. Yes, I have.
Q. And can you tell the jury, did he form an expert opinion as to the contents of Government's Exhibit 5?
A. Yes.
Q. What was that opinion?
A. That opinion was that it contained cocaine hydrochloride or powder cocaine, and then also procaine hydrochloride. And the cocaine hydrochloride purity was 16 percent.
Q. The cocaine purity was 16 percent?
A. Cocaine hydrochloride was 16 percent, correct.
Q. Was that item weighed?
A. Yes, the net weight was 238.7 grams.

Tr. 5/119

Q. After looking at the lab report and Mr. Olson's notes,

were you, yourself, able to form an expert opinion as to the contents of the exhibit that's now in front of you, Government's 5?

A. Yes.

Q. And what was your expert opinion?

A. I concur with his conclusion.

Q. Now, when you say you concur with his conclusion, you're saying that Government 5, in your expert opinion, is cocaine hydrochloride?

A. Yes.

Q. After he analyzed it, did he seal it?

A. He resealed it as he did the previous exhibits, and then submitted it back to the main vault.

MR. NOZICK: At this point the government will move into evidence what's been marked as Government's Exhibit 5.

THE COURT: Any objection?

MR. JARRETT: None, your Honor.

DEFENDANT ALEXANDER: No.

THE COURT: It's admitted.

(Government's Exhibit 5 received in evidence.)

MR. NOZICK: May I approach again?

THE COURT: You may.

BY MR. NOZICK:

Q. I'm handing you what's been marked as Government's

Exhibit 6. Do you recognize that, sir?
A. Yes, I do.
Q. Does that have a DEA lab number 159059 on it?
A. Yes, it does.
Q. Do you see Mr. Olson's name on it?
A. I see his name on the seal at the bottom.
Q. Do you see the date that he would have analyzed it?
A. The date opened was 9-8-2004 and the date sealed
9-9-2004.
Q. What tests were performed on that, if any?
A. Essentially the same tests as the previous exhibit.
However, the color test was eliminated because there was only
one container, so there was no screening to be done. It was
two confirmatory tests.
Q. Can you tell from his notes and lab reports the results
of the test?
A. The result is that it is cocaine hydrochloride at a
purity of 25 percent.
Q. Twenty-five percent, you say?
A. Twenty-five percent.
Q. And what's the weight of it?
A. The net weight 492.9 grams.
Q. Were you able to form an expert opinion as to what
Government's Exhibit 6 contains?

25 A. Once again, I concur with Mr. Olson that it's cocaine

Tr. 5/121

1 hydrochloride. If I could back up a little bit, this one also
2 contained two other components. It contained lidocaine and
3 procaine.
4 Q. Are those what you would refer to as cutting agents?
5 A. Yes. They're cutting agents, they're more appropriately
6 adulterants. There's a difference between an adulterant and a
7 dilutant. An adulterant is sort of a co-drug that's added to a
8 main drug, and the drug somewhat mimics the effect of the main
9 drug and somewhat enhances it. And so lidocaine and procaine
10 are very typical adulterants for cocaine. A cutting agent
11 would be something like starch or something extremely cheap,
12 just to bulk up the material and to essentially make a
13 controlled substance stretch out a little bit further.
14 Q. Did he reseal that after testing it?
15 A. Yes, he did. And sealed it as he did the previous
16 exhibits.

Q. Okay. And do you see his name or his initials on it?
A. Yes, I do, on the bottom.
MR. NOZICK: At this point the government will move what's been marked as Government's Exhibit 6 into evidence.
THE COURT: Any objection?
MR. JARRETT: None, your Honor.
DEFENDANT ALEXANDER: None.
THE COURT: It's admitted.
(Government's Exhibit 6 received in evidence.)

Tr. 5/122

BY MR. NOZICK:
Q. I'm handing you what's been marked as Government's Exhibit 8, and Government' s 7, and Government' s 9, Government' s 9-A, and Governments 9-B.
Do you recognize those exhibits?
(Brief pause.)
A. Yes, I do.
Q. What are those exhibits?
A. These are exhibits, DEA Exhibits 29.01, 29.02, and Exhibit 30 with laboratory numbers 159060 and 061, respectively.
Q. And did you have the opportunity to look at Mr. Olson's notes for these exhibits?
A. Yes, I have.

Q. And have you had the opportunity to look at his lab reports for those exhibits?
A. Yes.
Q. Which one would you like to discuss first.
A. Let's go in order and start with 29.
Q. What's the lab number for that?
A. That would be 159060.
Q. And what is the Government's Exhibit for that one?
A. It was actually -- it came into the laboratory as one exhibit, Exhibit 29, which was a total of 15 kilo packages that were eventually identified as cocaine. It was split into two

Tr. 5/123

separate exhibits, 29.01 and 29.02, due to the screening and the difference in chemical composition of four of those kilos versus the remaining 21.
Q. Okay. And do you see those in front of you with 159060 in two parts, 159060 and the other 159060?
A. That would be these three boxes.
Q. Now, when you say these three boxes, is that Government's Exhibit 8, 7, and 9?
A. That appears to be correct.
Q. Okay. And one of them, the first one on the lab report,

which one -- can you identify which of those roughly 21 kilos are in which box?

A. May I stand up?

THE COURT: You may.

A. I have to pull out the bags and separate out the core from the 21.

Q. Would that take a long period of time, or no?

A. I just need a place to put them.

Q. Would they fit on your desk in front of you, or no?

A. Probably not.

Q. Okay. Well, let's leave those in there for now. The first item that was tested, did Mr. Olson -- that's 159060, did he test actually all of the items under 159060?

A. Yes, he did.

Q. And have you had an opportunity to look at his notes?

Tr. 5/124

A. Yes, I did.

Q. Which tests did he perform on 159060?

A. He performed the GCMS test on all 25 kilos, kilo packages.

Q. So each individual kilo package was tested?

A. Was screened, correct.

Q. Is that DEA lab policy?

A. It's actually beyond policy. He was a pretty thorough chemist.

Q. When you say that all those kilos were tested, which tests were done on that cocaine or suspect cocaine?

A. Well, he performed the screening test on all 25. And then segregated the packages according to his results. And, again, he separated four from the other 21. and the 21 he designated as 29.01, DEA Exhibit 29.01, and the then the other four were 29.02.

Q. Let's talk about 29.01 first. Which test did he perform on those?

A. The same as the previous two or three exhibits.

Q. Was he able to form an expert opinion as to what 29.01 contained, that substance?

A. Yes, he did.

Q. What was his opinion?

A. Cocaine hydrochloride.

Q. Now, after looking at his lab reports and his notes, are

Tr. 5/125

you able to form an expert opinion as to Exhibit 29.01?

A. Yes, I concur with him that it was cocaine hydrochloride with a purity of 83 percent.

Q. Now, those other kilos, roughly four kilos that were separated out of the 25 kilos, is that 29.02?

A. That's correct.

Q. And what test did he perform on those?

A. The same testing scheme and -- same testing scheme was run on those.

Q. Okay. And was he able to form an expert opinion as to the contents of 29.02?

A. Yes. That they too contained cocaine hydrochloride with a purity of 81 percent, with an additional substance known as diltiazem, D-I-L-T-I-A-Z-E-M.

Q. Do you know what that substance is?

A. It's a heart medication, and it's found in these four kilos at a fairly low level. Definitely far lower than the cocaine.

Q. Have you seen that appear -- that drug, that diltiazem appear in cocaine before?

A. We have. And it's a trend that we see sort of popping up, and these sorts of trends happen from time to time.

Q. Now, for 29.01 and 29.02 as the DEA marked them, were you

24 able to form an expert opinion as to what that is?
25 A. Yes.

Tr. 5/126

1 Q. What was your expert opinion for both of those?
2 A. That they both, 29.01 and 29.02, contain cocaine
3 hydrochloride. 29.01 purity of 83 percent, and 29.02 purity of
4 81 percent.
5 Q. We already stated it, but when we say 29.01 and 02, the
6 exhibits that you're looking at is that Government's 7, 8 and
7 9?
8 A. Government's 7, 8 and 9, correct.
9 Q. Okay. Were those sealed by Mr. Olson after he did the
10 testing?
11 A. They were sealed back up, yes.
12 Q. And did he put his name and initials on it?
13 A. Yes.
14 MR. NOZICK: At this point the government will move
15 into evidence what's been marked as Government's Exhibit 7, 8
16 and 9.
17 THE COURT: Any objection?
18 MR. JARRETT: Your Honor, we have no objections to

the conclusions reached by this witness. But for the objections previously stated, we would object to the admission of those items into evidence.

THE COURT: Are you talking about the matter that we spoke of at side bar?

MR. JARRETT. Yes, your Honor.

THE COURT: Mr. Alexander, any objection?

Tr. 5/127

DEFENDANT ALEXANDER: I adopt the same objection, your Honor.

THE COURT: Solely, that objection?

DEFENDANT ALEXANDER: Yes.

THE COURT: You don't object to the conclusion of what is there, but to the previous objection.

DEFENDANT ALEXANDER: Just to the admission.

MR. JARRETT: And before I cut you off, your Honor, there's another thing. As well as the chain of custody of the foundation because of the break in the time.

(Side bar discussion.)

THE COURT: You're going to have to explain that in more detail. That's different. And for the record, when we're

talking about the objection the other day, we were talking about the motion to suppress.

MR. JARRETT. Right, your Honor. The objection as to the chain of custody relates to the items that are now being offered into evidence having at one time allegedly been in that Dodge Magnum or removed from the Dodge Magnum on the 18th of August.

THE COURT: The items that were what?

MR. JARRETT: The items that are now being offered into evidence, the cocaine, allegedly having been removed from the Dodge Magnum on August 18th, 2004, were supposedly in that Dodge Magnum at the time. My client was driving that vehicle

Tr. 5/128

the previous day. There's still that gap in time between the time that he was stopped and the time that these items were removed from his car that we believe --

THE COURT: Mr. Jarrett, are you saying that there's no explanation to what happened after they took the car away from your client?

MR. JARRETT: Right.

THE COURT: And they tested it the next day?

MR. JARRETT: Right.

THE COURT: Same objection?

DEFENDANT ALEXANDER: Yes. Yes.

MR. NOZICK: Judge, we have established the legal chain of custody. The chain of custody goes from the time that it was recovered to the time it is tested and goes into evidence. It doesn't go from before it's recovered. We do believe we have established chain of custody. It's been in a secure DEA facility, and we have established it from the time that Mr. Jarrett is talking about and that it was secured in a DEA facility beforehand. We don't even have to prove chain of custody from then; it's chain of custody from getting out of the car --

THE COURT: Did you explain to Mr. Jarrett that the car was taken to the DEA headquarters in Merrillville, locked up and nobody else --

MR. JARRETT: That was one explanation offered, your

Honor, but the tow report does suggest --
(End of side bar.)
THE COURT: Objection overruled. Exhibits 7, 8 and 9
are all ordered admitted.
(Government's Exhibits 7, 8, 9 received in evidence.)
MR. NOZICK: Your Honor, I would ask that the witness
be allowed to take the contents out of the box and show it to
the jury?
THE COURT: You can.
BY MR. NOZICK:
Q. For the record, which box are you looking at first there?
A. I'll start with 7. Did you want me to identify each bag
as I pull it out?
Q. You may.
A. This is marked Exhibit 29, not .01 or .02, but just 29,
meaning that it's probably the collective packaginq of all 25,
and it's even marked original packaging. And it has
Mr. Olson's seal. And this appears to be all the original
packaging for the 25. Two of these packages are labeled as
brick 24 and brick 21 for Exhibit 29.0l. So these two go with
the 21 bricks, kilo bricks from Exhibit 29.01. The remaining

packages in here are all marked 29.02. This small one right here is roughly a 25-gram composite formed from the four kilos in 29.02.

Q. Mr. DeFrancesco, just to speed things up a bit. The box

Tr. 5/130

you're looking in, how many kilos of tested cocaine are in that one?

A. Six.

Q. Okay. Could you move to the next exhibit?

A. Certainly. Plus the composite.

Q. Thank you.

A. In Government's 8, this is a composite for 29.01 very similar to 29.02, roughly 25 grams.

(Brief pause.)

A. There are eight kilo packages in Government's 8, all labeled 29.01.

Q. Thank you. Now, you keep using the word kilo. That's 2.2 pounds in a kilo?

A. 1,000 grams, correct, approximately 1,000 grams or two and a quarter pounds.

Q. Okay. And is there a third box up there that you haven't opened up yet that's in evidence already?

A. This is Government's Exhibit 9.

(Brief pause.)
Q. How many kilos are in that package?
A. Eleven.
Q. So between the three exhibits that we have just entered,
how many kilos of powder cocaine are there?
A. Eleven, plus --
Q. I apologize.

Tr. 5/131

A. Six, 11 and six is 17, 18, 19, 20, 21, 22, 23, 24, 25.
Q. So between the three exhibits we have just entered, there
are 25 kilos of tested cocaine?
A. Yes, sir.
Q. You have talked about the different break up of four
kilos from the other 21 kilos, is that correct?
A. That's correct.
Q. But they all contain cocaine, is that right?
A. That's correct.
Q. The only -- is it accurate to say the only difference is
what some of the other agents were in there?
A. That, and a slight difference of the purity level.
Q. Okay.
THE COURT: Counsel, would you be so kind as to
remove the exhibits?
MR. NOZICK: Yes, that's what I'm going to do.

BY MR. NOZICK:
Q. Mr. DeFrancesco, was there also another roughly three kilos that were tested in another exhibit?
A. There was an Exhibit No. 30 submitted to the laboratory.
Q. Okay. And is that 159051?
A. That's correct.
Q. And are those marked as a Government's Exhibit?
A. Government's Exhibits 9-A and 9-B.
Q. Okay. Did Mr. Olson test those?

Tr. 5/132

A. Yes, he did.
Q. Can you tell from his lab report and the notes what tests were performed on those?
A. Essentially the same tests as the previous exhibit.
Q. And was he able to form an expert opinion as to the content of that exhibit?
A. That the four kilos contained cocaine hydrochloride.
Q. After looking at his notes and his lab report, were you able to form an expert opinion as to the contents of that exhibit?
A. Yes, I was.
Q. What's your expert opinion?
A. I concur with his that it was cocaine hydrochloride at a

purity of 81 percent.
Q. Did he weigh those?
A. Yes, he did. His net weight was 3,001 grams.
Q. Did he seal it up and write on the -- write his name on the sticker before putting it into evidence?
A. Yes. Here's his sticker on this one and here's his sticker on that one.
Q. Now, the purity of these, did you state a minute ago what the purity was?
A. The purity on Government's 9-A and B, 81 percent.
Q. Does that match the purity on some of the other cocaine that was tested?

Tr. 5/133

A. I believe 29.01 -- I'm sorry, 29.02 was likewise 81 percent.
Q. But that was the piece that had the diltiazem in it as well?
A. That's correct.
MR. NOZICK: At this point, your Honor, the government will move into evidence what's been marked as Government's Exhibit 9-A and 9-B.
THE COURT: Any objection?

MR. JARRETT: Same objections as previously stated both before today and at the bench just a few minutes ago, your Honor.

THE COURT: On the previous objection at side bar?

MR. JARRETT: Yes, your Honor --

DEFENDANT ALEXANDER: Same objection.

THE COURT: Objection overruled, 9-A and 9-B are both ordered admitted.

(Government's Exhibit 9-A, 9-8 received in evidence.)

MR. NOZICK: Thank you, sir.

BY MR. NOZICK:

Q. Just to make sure that --

THE COURT: Counsel, ask questions. The jury will make sure of whether to make sure.

MR. NOZICK: Good point.

BY MR. NOZICK:

Tr. 5/134

Q. Mr. DeFrancesco, I didn't miss any items that you tested or that Mr. Olson tested pertaining to this case, have I?

A. Not that I was notified of ahead of time.

MR. NOZICK: Nothing further.

THE COURT: Cross, Moon.

CROSS-EXAMINATION

BY MR. JARRETT:

Q. Mr. DeFrancesco, the testimony you have been providing today regarding the examination of these items, were they -- was the testing done in your laboratory in Chicago?

A. Yes, sir.

Q. Can you give us a rough estimate as to how much time was expended both by Mr. Olson and yourself to conduct the testing that allowed you to reach the conclusions that you testified to here today?

A. I'd have a hard time -- I'd have to give a real rough ballpark estimate as to how much time he had devoted to this. I would say for the smaller exhibits, somewhere between four to eight hours per exhibit. And then for the Exhibit 29, it was 25 kilos, so that's far more involved. And the fact that it had to be split and it had an unusual component in the one, it could be anywhere from -- I don't know, two days to do that one. So figure 16, maybe three days, 24 hours, and then possibly another eight to 16 hours on the last exhibit.

Q. Thank you. In your laboratory and the DEA in Chicago,

FILED
JUL 7 - 2008

Nos. 07-1251 and 07-10255

In the Supreme Court of the United States

ANTHONY ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE MOON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a forensic chemist's expert testimony that various government exhibits contained marijuana, cocaine hydrochloride, or cocaine base violated petitioners' Sixth Amendment right to confront the chemist who operated the data-generating machines in the laboratory and constituted reversible plain error.

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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a)[1] is reported at 512 F.3d 359.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-9a) was entered on January 3, 2008. The petitions for a

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 07-1251.

writ of certiorari were filed on April 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioners were convicted of conspiring to possess with intent to distribute and to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846, and two counts of using a cellular telephone to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). Petitioner Anthony Alexander (Alexander) also was convicted of five counts of distributing cocaine, 50 grams or more of cocaine base, and marijuana, in violation of 21 U.S.C. 841(a)(1). Petitioner George Moon (Moon) was convicted of possessing five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. Br. 4-6. Alexander was sentenced to life imprisonment on one count and concurrent aggregate terms of 120 months of imprisonment on the remaining counts. *Id.* at 6. Moon was sentenced to aggregate terms of 190 months of imprisonment, to be followed by five years of supervised release. *Ibid.* The court of appeals affirmed. Pet. App. 1a-9a.

1. In February 2004, the Drug Enforcement Administration (DEA) began an investigation of drug trafficking activity by Alexander in Gary, Indiana. On four occasions during May and June of 2004, confidential informants purchased quantities of marijuana, powder cocaine, and crack cocaine from Alexander for a total of $14,500. Gov't C.A. Br. 7-8.

Based in part on those purchases, the DEA received court authorization to intercept calls on two cellular telephones used by Alexander. The wiretap was active

between July 22, 2004, and August 20, 2004, and intercepted a series of conversations between Alexander and Moon. The conversations revealed that Moon would "front[]" drugs to Alexander, and Alexander would pay Moon for the drug supply after he sold part or all of the inventory. Gov't C.A. Br. 7-10; Pet. App. 7a-8a.

On August 11, 2004, a confidential informant purchased $12,000 of cocaine from Alexander. That same day, Alexander called Moon. Using coded language, Moon informed Alexander that he would supply Alexander with four to six kilograms of cocaine the following week. On the morning of August 17, 2004, Moon called Alexander and indicated that he (Moon) was on a "tarmac" and was driving a "nice Baron," which was a type of small airplane. Moon called Alexander again five hours later and indicated that he was "moving toward [Alexander's] way" and would arrive in around 30 minutes. Gov't C.A. Br. 10-12.

That day, DEA agents observed Moon meet with Alexander in front of Alexander's mother's house. Moon opened the rear hatch of his car, removed a nylon cooler bag, and walked toward the front yard of the residence with Alexander. Moon returned alone to the car five or six minutes later, replaced the cooler bag in the car, and drove away. Upon instruction from the DEA, an officer with the Gary Police Department conducted a traffic stop on Moon. Moon initially consented to a search of his car, but he retracted his consent when the officer reached for the cooler bag in the rear compartment. A drug-detection dog arrived and alerted to the back door of the car; agents impounded the vehicle. Agents obtained a federal warrant to search the car and recovered $60,000 packaged in heat-sealed plastic bags and 28 kilograms of cocaine. The serial numbers on $5808 of the

cash matched those of the currency that the confidential informant had used to purchase cocaine from Alexander six days earlier. A heat sealer was subsequently recovered from Alexander's mother's house. Gov't C.A. Br. 12-14 & n.5.

On August 20, 2004, Moon arranged to meet with Alexander to "wrap things up." Moon arrived at the designated meeting place in a Cadillac driven by someone else. Agents observed Alexander walk toward the Cadillac with something in his hands and then lean into the passenger side window of the car. After the Cadillac drove away, officers stopped the car and arrested Moon on a federal warrant. A bag containing $20,000 was recovered from the back seat of the car. Gov't C.A. Br. 15-17.

2. On October 22, 2004, a grand jury in the Northern District of Indiana returned a nine-count superseding indictment charging both petitioners with conspiring to possess with intent to distribute and to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846, and two counts of using a cellular telephone to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). Alexander was charged individually with five counts of distributing cocaine, 50 grams or more of cocaine base, and marijuana, in violation of 21 U.S.C. 841(a)(1). Moon was charged individually with possessing five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. Br. 4-5.

3. At trial, the government presented expert testimony from James DeFrancesco (DeFrancesco), a senior forensic chemist in the DEA laboratory where the controlled substances related to this case were analyzed. Ragnar Olson (Olson), the forensic chemist who con-

ducted the chemical analyses in the laboratory, had left the DEA to attend law school and did not testify at trial. DeFrancesco reviewed the data Olson had generated, Olson's handwritten notes about the procedures he used, and Olson's report of his conclusions. For each drug exhibit, DeFrancesco testified about the conclusion Olson had reached about the identity of the controlled substance and about his own independent conclusion on the same question. DeFrancesco based his independent opinions on the data and information in Olson's paperwork. DeFrancesco's independent conclusions were consistent with Olson's conclusions. Pet. App. 1a-2a; Gov't C.A. Br. 17-19. Neither petitioner objected to DeFrancesco's testimony. Pet. App. 2a. In fact, Moon's counsel indicated affirmatively that he "ha[d] no objections to the conclusions reached by [DeFrancesco]," and Alexander, who represented himself at trial, concurred. *Id.* at 47a-48a. On February 28, 2005, the jury returned guilty verdicts on all counts. Gov't C.A. Br. 6.

4. On appeal, petitioners asserted for the first time that DeFrancesco's testimony violated the Confrontation Clause. Petitioners claimed that DeFrancesco's reliance on Olson's work as the basis for his testimony deprived petitioners of their right to confront and cross-examine Olson. Pet. App. 2a. The court of appeals affirmed. Pet. App. 3a-6a.

The court of appeals first noted that appellate review of petitioners' claim was "limited to plain error." Pet. App. 2a. The court recognized that defendants may have an incentive not to raise a Confrontation Clause objection to hearsay evidence at trial because a successful objection "would compel the prosecution to produce a stronger witness." *Ibid.* In this case, the court noted that petitioners "would have been worse off" if Olson

had testified. *Ibid.* Without Olson, petitioners "could undermine DeFrancesco's testimony by reminding the jury that he had not done any of the work and that flaws in Olson's procedures may have been omitted from the lab notes." *Id.* at 2a-3a. The court observed that the fact "[t]hat it may be to defendants' advantage to accept the hearsay version of evidence makes it problematic to entertain a *Crawford* [v. *Washington*, 541 U.S. 36 (2004),] claim via the plain-error clause of Fed. R. Evid. 103(d)." *Id.* at 3a.

The court of appeals also held that "there was no problem with DeFrancesco's testimony." Pet. App. 3a. The court noted that DeFrancesco testified as an expert, and "the facts or data [upon which the expert relies] need not be admissible in evidence in order for the opinion or inference to be admitted." *Ibid.* (quoting Fed. R. Evid. 703). Accordingly, regardless of whether Olson's reports or the conclusions they contained were admissible under the Confrontation Clause, DeFrancesco's expert testimony was properly admitted. *Ibid.*

The court of appeals then addressed the admissibility under the Confrontation Clause of Olson's reports. Pet. App. 3a-4a.[2] The court observed that the reports "ha[d] two kinds of information: the readings taken from the instruments, and Olson's conclusion that these readings mean that the tested substance was cocaine." *Ibid.* The court held that Olson's conclusion that "this substance was cocaine" was testimonial because the primary pur-

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[2] Although the court of appeals suggested that Olson's reports themselves were admitted into evidence, the transcript does not support that conclusion. But DeFrancesco did testify, without objection, about the test results and conclusions that were contained in Olson's reports. Pet. App. 23a-26a, 29a-31a, 34a, 38a, 40a-41a, 44a-46a, 54a.

pose of that statement was "to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 4a (quoting *Davis* v. *Washington*, 547 U.S. 813, 822 (2006)). The readings from the instruments, however, were not "statements" at all, let alone testimonial ones, the court held. *Id.* at 4a-5a. The court reasoned that "data are not 'statements' in any useful sense" and a machine is not "a 'witness against' anyone." *Id.* at 4a. "[H]ow could one cross-examine a gas chromatograph?" observed the court. *Id.* at 4a-5a.

The court of appeals concluded that "the Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial." Pet. App. 5a. Accordingly, DeFrancesco was "entitled to analyze the data that Olson had obtained," and admission of the background data—which, the court noted, was not required to be presented to the jury at all under Federal Rule of Evidence 703—did not implicate the Confrontation Clause. *Ibid.* The court determined that Olson's conclusions about what the raw data meant "should have been kept out of evidence," but any error in their admission was not prejudicial because DeFrancesco reached the same conclusions independently and was available for cross-examination. *Id.* at 5a-6a.

ARGUMENT

Petitioners contend (07-1251 Pet. 7-14; 07-10255 Pet. 4-6) that the court of appeals erred by holding that machine-generated data do not constitute testimonial statements of witnesses subject to the Confrontation Clause. Alexander (Pet. 7) asks the Court to hear this case with *Melendez-Diaz* v. *Massachusetts*, cert. granted, No. 07-591 (Mar. 17, 2008), or to hold the peti-

tions for a writ of certiorari pending the resolution of *Melendez-Diaz*. Further review is unwarranted. The court of appeals' decision is correct and does not conflict with any decision of this Court, another federal court of appeals, or a state court of last resort. Nor is it necessary to hold the petitions for a writ of certiorari pending resolution of *Melendez-Diaz*.

1. a. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), this Court held that where the government offers into evidence a "testimonial" statement of an absent witness at a criminal trial, the Confrontation Clause requires both that the witness be unavailable and that the defendant have had a prior opportunity to cross-examine the witness. Although the Court in *Crawford* did not define the scope of "testimonial" hearsay comprehensively, it noted that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Ibid.* In *Davis* v. *Washington*, 547 U.S. 813 (2006), the Court applied the "testimonial" standard to statements made to law enforcement personnel during a 911 call and at a crime scene. The Court held that in that context, statements are nontestimonial when the circumstances "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," and statements are testimonial when there is no ongoing emergency and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822.

b. The court of appeals correctly concluded that raw data generated by a machine in a laboratory are not testimonial statements of witnesses subject to the Confrontation Clause. In *Crawford*, the Court held that the term "witnesses" in the Confrontation Clause refers to those who "bear testimony." 541 U.S. at 51. As the court of appeals noted, machines cannot be "witnesses" in the sense intended by the Sixth Amendment because they cannot be called to the witness stand to respond to cross-examination. Pet. App. 4a-5a. A machine that generates chemical data in the laboratory is no more a "witness" than is a video camera that takes surveillance photographs during a bank robbery.

Although Alexander characterizes the court of appeals' analysis of that question as "novel" (Pet. 12), the court followed the only other decision of a federal court of appeals that had addressed the same issue at that time. Pet. App. 4a. In *United States* v. *Washington*, 498 F.3d 225, 230 (4th Cir. 2007), petition for cert. pending, No. 07-8291 (filed Dec. 14, 2007), the court held that raw data produced by a gas chromatograph machine used to analyze a sample of the defendant's blood were "the 'statements' *of the machines* themselves, not their operators." Consistent with the ruling here, the Fourth Circuit held that "'statements' made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause." *Ibid.*

Recently, the Eleventh Circuit also held that data generated by a machine, and without the assistance of contemporaneous human interpretation or analysis, are not statements of human witnesses subject to the Confrontation Clause. *United States* v. *Lamons*, No. 06-14427 (July 3, 2008), slip op. 15-24. In *Lamons*, the court analyzed whether a compact disc containing

telephone-call data and a printed report of certain data extracted from that disc constituted testimonial hearsay. Citing *Washington* and the Seventh Circuit's decision in this case, the court held that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses, and * * * the evidence challenged in this appeal does not contain the statements of human witnesses." *Id.* at 20. The court observed that although humans participate in the design and construction of any machine, "certain statements involve so little intervention by humans in their generation as to leave no doubt that they are wholly machine-generated for all practical purposes." *Id.* at 21 n.23.

Alexander contends (Pet. 12-14) that the court of appeals' analysis "oversimplifies the science behind gas chromatography mass spectrometry" and "ignores the possibility of operator bias, malfeasance, or plain incompetence." Moon asserts (Pet. 5) that the court "failed to distinguish between machine-generated data produced through human assistance or input and machine-generated data produced without human assistance or input." Having failed even to object at trial to the admissibility of the data that they now challenge, however, petitioners lack a record on which to assert that the court "oversimplifie[d] the science" of the chemical analyses performed in this case or "failed to distinguish" between various types of machine-generated data. And as the court of appeals explained (Pet. App. 5a), the possibility that the machine-generated data were unreliable because of operator error or malfeasance was a topic that petitioners could have—but did not—address in questions to DeFrancesco about the foundation for his

expert opinions about what the raw data meant.[3] This case thus is a poor vehicle for further review of the question petitioners urge on the Court.

The cases on which Alexander relies (Pet. 10-11) do not conflict with the decision in this case. All but one of the cases Alexander cites as supporting his view that "laboratory reports are 'testimonial'" (Pet. 10) involved the admission of a laboratory report containing a *conclusion* about what the raw data meant without testimony from the author of the report *or* from an expert witness who had independently analyzed the data.[4] In holding that the laboratory reports were testimonial statements admitted in violation of the Confrontation Clause, those courts had no occasion to parse differences between machine-generated data and conclusions derived from

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[3] The only questions concerning Olson's skills and competence were posed to DeFrancesco by the prosecutor in direct examination. DeFrancesco testified that Olson left the DEA on "[f]antastic terms" and that he was "outstanding" and had never been the subject of allegations of misconduct or incompetence. Tr. 5/95.

[4] See *Hinojos-Mendoza* v. *People*, 169 P.3d 662, 664 (Colo. 2007) (en banc) (pursuant to statute, laboratory report containing conclusion that "[a]nalysis disclosed the presence of cocaine, schedule II" entered into evidence without testimony of technician who prepared the report) (brackets in original), petition for cert. pending, No. 07-9369 (filed Feb. 4, 2008); *State* v. *March*, 216 S.W.3d 663 (Mo.) (en banc) (laboratory report identifying seized substance as cocaine base entered into evidence without testimony of analyst), cert. dismissed, 128 S. Ct. 1441 (2007); *State* v. *Caulfield*, 722 N.W.2d 304 (Minn. 2006) (pursuant to statute, laboratory report identifying seized substance as cocaine entered into evidence without testimony of technician who prepared the report). Alexander also cites (Pet. 11) *City of Las Vegas* v. *Walsh*, 124 P.3d 203 (Nev. 2005), cert. denied, 547 U.S. 1071 (2006), which involved the admission of an affidavit of a nurse describing the procedures she used to draw a blood sample for chemical analysis. That case did not involve raw data or a scientific test result and is inapposite.

such data. In this case, where an expert witness testified and was subject to cross-examination about his own independent conclusions concerning the meaning of the raw data—a fact that rendered harmless the admission of the laboratory analyst's identical conclusions—the court of appeals had occasion to and did address the distinct question of whether the raw data itself was testimonial hearsay.[5]

The remaining case cited by Alexander, *Roberts* v. *United States*, 916 A.2d 922 (D.C. 2007), also establishes no conflict warranting the Court's review. In *Roberts*, a DNA expert provided opinion testimony pursuant to Rule 703 of the Federal Rules of Evidence and, as here, relied on the results of scientific tests conducted by others. *Id.* at 937-938. The court of appeals found that the expert witness had rested his opinion in part on "*conclusions* reached by the team that did the actual laboratory analysis" and held that those "conclusions" were testimonial statements subject to the Confrontation Clause. *Id.* at 938 (emphasis added). The court held that "[t]o the extent that [those] conclusions were used as substantive evidence against [the defendant] at trial," the Sixth Amendment was violated. *Ibid.* *Roberts* thus is consistent with the Seventh Circuit's holding in this case that Olson's conclusions were testimonial and that the admission of DeFrancesco's testimony reciting those conclusions was error (but not prejudicial error). *Roberts* did not address whether raw data produced by a scientific instrument is a testimonial statement of the

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[5] To the extent that Alexander contends (Pet. 18-19) that the court of appeals erred by concluding that DeFrancesco reached his opinions independently and did not simply recite Olson's conclusions, that factbound claim does not warrant review.

individual who operated the machine, and further review of that separate question therefore is not warranted.

c. Even if petitioners could establish a disagreement between the court of appeals' decision and a decision of another court on the Confrontation Clause analysis, this Court's intervention would be unwarranted. As the court of appeals emphasized, petitioners failed to raise any challenge to DeFrancesco's testimony at trial. Pet. App. 2a-3a. Contrary to Alexander's argument (Pet. 15-19), any Confrontation Clause error in the admission of DeFrancesco's testimony concerning the raw data in Olson's report would not be subject to the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). The plain-error standard applies instead and imposes on *petitioners* the burden to demonstrate that an "obvious" error affected their substantial rights and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732 (1993) (citations and internal quotation marks omitted).

Petitioners cannot meet the plain-error standard. At the outset, any error in the admission of testimony about the machine-generated data was not "obvious." Nor can petitioners make the additional *Olano* showings. Although petitioners contend that they were deprived of the opportunity to cross-examine Olson about whether he operated the instruments in the laboratory properly, they had the opportunity at trial to cross-examine DeFrancesco about the possibility that "flaws in Olson's procedures" (Pet. App. 3a) could have affected the reliability of the data on which DeFrancesco based his conclusions. They did not do so. There is no basis on this record for concluding that admission of the machine-generated data documented by Olson had any effect on

petitioners' substantial rights or that it seriously affected the fairness and integrity of the trial. See Pet. App. 3a ("The lack of a demand for testimony by an available declarant leads to the conclusion that the appellate argument is strategic rather than sincere."). Cf. *Roberts*, 916 A.2d at 939-940 & n.22 (admission of testimonial conclusions of laboratory technicians did not seriously affect fairness and integrity of trial where expert witness's independent analysis of DNA test results were "key constituents" of his opinions, expert was subject to thorough cross-examination about kinds of tests performed in laboratory and the bases for his conclusions, and defendant had "never suggested" how the results of the underlying tests were inaccurate or presented testimony undermining those results). Further review therefore is unwarranted.

2. There is no need to hold the petitions for a writ of certiorari pending the Court's resolution of *Melendez-Diaz* v. *Massachusetts*, cert. granted, No. 07-591 (Mar. 17, 2008). *Melendez-Diaz* presents the question whether the Confrontation Clause is violated by the admission into evidence of a sworn certificate of the result of a controlled-substance analysis without live testimony from the analyst who prepared it. Unlike petitioners, the defendant in *Melendez-Diaz* had no opportunity to cross-examine any witness about the procedures used to analyze the controlled substances in the laboratory. Nonetheless, if the issue presented by petitioners were properly preserved, the Court might have wished to hold this case for *Melendez-Diaz* because the opinion in that case might shed light on the distinction, for "testimonial" hearsay purposes, between machine-generated data and conclusions drawn from such data. But petitioners did not properly preserve any Confrontation

Clause objection in the district court. And because petitioners cannot satisfy the stringent requirements for relief under the plain-error standard, the Court's resolution of *Melendez-Diaz* will not affect the outcome here.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2008

(3)

No. 07-1251

FILED
JUL 17 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

ANTHONY ALEXANDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT IN REPLY

The Government fails to acknowledge that this Court has already granted the writ of certiorari in *Melendez-Diaz v. Massachusetts,* No. 07-591 (petition granted Mar. 17, 2008), on the identical question presented in this Petition: whether laboratory test results constitute "testimonial" evidence subject to the Confrontation Clause. In granting certiorari in *Melendez-Diaz*, this Court has already concluded that the question presented in this Petition involves an important Constitutional question that is the matter of substantial controversy. In fact, the Seventh Circuit recognized the significance of the grant of certiorari in *Melendez-Diaz* when it took the unusual step of reversing its denial of Mr. Alexander's motion to appoint counsel to file this very Petition.

The Government's Brief in Opposition ("Opp.") contains only three responsive arguments. First, the Government asserts that Petitioner's case is different because here, the admitted laboratory reports contained both "conclusions" and "raw data," and the "raw data" portion of those reports was not testimonial. Second, the Government contends that its DEA expert, DeFrancesco, rendered an independent opinion with regard to the alleged substances based on this raw data. Third, the Government argues Petitioner cannot win because he failed to object at trial to the admission of the laboratory reports. These arguments are manifestly erroneous.

I. There Is No "Raw Data" In Any Of Olson's Reports Regarding The Identity Of The Seized Items.

The Government repeats the same mistaken view accepted by the court of appeals that there was "raw data" of a non-testimonial nature regarding the nature of the seized substances, and that the admission of this "raw data" into evidence[1] did not violate the Confrontation Clause. (Opp. at 9).

Review of the actual Chemical Analysis Reports proves that the Government's theoretical distinction between "non-testimonial" or "raw" data and "testimonial" interpretation of that data does not apply here. (Reply Br. App. E at 1a- 10a).

For example, the Chemical Analysis Report ("Report") and accompanying page of chain-of-custody notes for the seized item identified as Laboratory Exhibit 21 demonstrates that the Government's view is incorrect. (*Id.* at 3a - 4a.) The one-page report is titled, "Analysis Summary and Remarks." (*Id.* at 3a). The bottom of the report is

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[1] It is unclear whether the Chemical Analysis Reports themselves were admitted into evidence. The Seventh Circuit opinion asserts that the reports were "received into evidence." (Pet. App. at 3a). The Government concedes that "DeFrancesco did testify . . . about the test results and conclusions that were contained in Olson's reports." (Opp. at 6, n. 2). However, there is no indication that any "raw data generated by a machine in a laboratory" was made available to the jury (either directly or through DeFrancesco's testimony).

signed by Olson, and approved by a DEA laboratory director. (*Id.*) Below the signatures, the document reads "Page 1 of 1." (*Id.*)

The body of this Report contains only seven lines of text. Those lines are:

Laboratory No.: 157744

Exhibit 21 contains: Cocaine Hydrochloride and Caffeine

Gross Wt.: 152.9 grams (g)

Net Wt.: 125.0 g

Active Drug Ingredient: Cocaine Hydrochloride - 71%

Amount of Pure Drug: 88.7 g

Reserve Wt.: 124.5 g

(*Id.*)

This Report contains nothing more than bottom-line conclusions about the identity of the substance. There is no "raw data," independent of the conclusions, that could identify the substance.[2]

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[2] The second page is a DEA form, signed by Olson and others, titled "Report of Drug Property Collected, Purchased or Seized." (Reply Br. App. E at 4a.) This form documents the chain of custody of the substance identified as exhibit 21. (*Id.*) Nothing on this second page contains more than an allegation about the nature of the substance. (*Id.*)

Olson's report concludes that "Exhibit 21 contains: Cocaine Hydrochloride and Caffeine" and that the "Active Drug Ingredient" is "Cocaine Hydrochloride - 71%." Even the Seventh Circuit acknowledged that "[a] chemist's assertion that 'this substance was cocaine' meets the *Davis* [*v. Washington*, 547 U.S. 813 (2006] definition [of testimonial evidence.]" *Moon*, 512 F.3d at 362. The other Chemical Analysis Reports are as conclusory as this one. (Reply Br. App. at 1a, 2a, 5a - 10a.)

In light of this evidence, this Court should reject the Government's position that there is a meaningful distinction to be drawn between the "non-testimonial" data about the nature of the seized substances in Olson's reports and his "testimonial" conclusions. Because the Reports contain Olson's testimonial conclusions about the identity of the substances, and only his testimonial conclusions, the Court should grant this Petition, either with the *Melendez-Diaz* case or thereafter.

II. DeFrancesco Rendered Pure Conduit Testimony, Not An Independent Expert Opinion.

The Government asserts that there was no Confrontation Clause violation in this case because, unlike the petitioner in *Melendez-Diaz*, Petitioner had a live witness who could be cross-examined: the Government's expert, DeFrancesco.

In this case, the cross-examination of DeFrancesco could not satisfy the Confrontation Clause requirements of *Crawford v. Washington,* 541 U.S. 36 (2004), because DeFrancesco was testifying

as a conduit for Olson's conclusions and not in his own independent capacity. Thus, Petitioner lacked a meaningful opportunity to cross-examine the true proponent of the substantive opinion: Olson.

The courts are clear that experts may not serve as conduits for the opinions of others without violating the Confrontation Clause, even if the testifying expert merely references the other opinions to "bolster" his own independent analysis. *See United States v. Cuong*, 18 F.3d 1132, 1143 (4th Cir. 1994) (reversing drug conviction because government medical expert improperly bolstered his own testimony by referencing opinion of non-testifying expert and stated that the non-testifying expert's opinion was "essentially the same" as his own); *Hutchinson v. Groskin*, 927 F. 2d 722, 725-26 (2d Cir. 1991) (finding "plain error" where defendant expert served "as a conduit" where he stated that letters containing opinions of non-testifying witnesses that were "consistent with" his own); *United States v. Lawson*, 653 F.2d 299, 302 (7th Cir. 1981) ("An expert's testimony that was based entirely on hearsay reports, while it might satisfy Rule 703, would nevertheless violate a defendant's constitutional right to confront adverse witnesses.") *United States v. Williams*, 431 F.2d 1168, 1172-74 (5th Cir. 1970) (*en banc*) (finding Confrontation Clause violation when government expert was allowed to introduce factual bases for his opinion when such bases were prepared by out-of-court witnesses); *see also State v. Towne*, 452 A.2d 1133, 1135 (Vt. 1982) (finding Confrontation Clause

violation where government expert was "acting as a conduit" for another, non-testifying doctor's opinion).

DeFrancesco did not render an independent opinion in this case, as can be seen from his testimony about the item identified as Exhibit 21:

BY MR. NOZICK:

Q. Now, was Mr. Olson able to form an expert opinion as to what the contents of this exhibit were?

A. Again, cocaine hydrochloride and caffeine.

Q. Were you able to form an expert opinion as to the contents of this exhibit?

A. As I did before after reviewing his paperwork, I concur.

Q. Okay. So your expert opinion is that this is powder cocaine or cocaine hydrochloride?

A. *Based on his results*, yes.

(Pet. App. at 31a) (emphasis added).

DeFrancesco testifies that Olson's "results were cocaine hydrochloride and caffeine." (Pet. App. at 30a). He states that he "concur[s]" with Olson's "expert opinion." (Pet. App. at 31a). Although he states that he also reviewed Olson's "notes" and his "data," (*id.* at 18a), he does not identify which data he reviewed or even indicate that he performed his own independent analysis of that data. Rather, the stated basis for DeFrancesco's expert opinion is his reliance on "[Olson's] results." (*Id.* at 31a.) This type of conduit testimony constitutes DeFrancesco's statement with regard to all the drug exhibits.

A recent case shows how resolution of the *Melendez-Diaz* case will determine whether DeFrancesco's conduit testimony violated the Confrontation Clause. In *Commonwealth v. Carter*, 932 A.2d 1261 (Pa. 2007), a state drug lab manager testified in virtually the same manner as DeFrancesco did in this case: the lab manager's testimony "was not his own opinion, but merely a repetition of the information in the lab report; and the report and this testimony were the only substantive evidence establishing an essential element of the crime, *i.e.*, the presence of a controlled substance." *Id.* at 1263. An *en banc* panel of the Pennsylvania Superior Court reversed the conviction, finding a Confrontation Clause violation. *Id.* A plurality of the Pennsylvania Supreme Court reversed the lower court, but only after applying a pre-*Crawford* Confrontation Clause analysis and characterizing the laboratory reports as business records or official records subject to a hearsay exception. *Id.* at 1265 n. 3 ("*Crawford* is inapplicable to this case, and [*Ohio v.*] *Roberts* [448 U.S. 56 (1980)] governs our Confrontation Clause analysis.")[3] It is clear that, absent this pre-*Crawford* analysis, the use of a surrogate witness to read the laboratory reports into evidence would have been "reversible error." *Carter*, 932 A.2d at 1265-66. Thus, unless forensic laboratory report conclusions are "non-

---

[3] The Pennsylvania Supreme Court did not apply *Crawford* because *Crawford* does not apply retroactively. *Carter*, 932 A.2d at 1265 n. 3.

testimonial" evidence under *Crawford*, the introduction of Olson's laboratory results into evidence through DeFrancesco's conduit testimony violated the Confrontation Clause. *See* Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 585 (1986) ("[B]ack door introduction of the contents of a nontestifying expert's report, without producing the author of the material, impinges on the criminal defendant's sixth amendment rights.")

Even if this Court decides in *Melendez-Diaz* that laboratory reports are "testimonial" evidence subject to the Confrontation Clause, this Petition provides an extreme example of how the Government may respond if it cannot introduce drug certificates or reports directly into evidence: "a prosecutor could make an end-run around *Crawford* by supplying a token witness for cross-examination." Bradley Morin, *Science,* Crawford, *and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U.L.REV. 1243, 1271 (2005). In the ordinary case, expert testimony based on independent analysis is a sufficient substitute for direct confrontation of absent lab technicians. This Court should take this opportunity, however, to draw the line at pure conduit testimony.

Thus, this Petition should be considered along with the *Melendez-Diaz* case to provide a comprehensive answer to the question of whether the Confrontation Clause applies to substance identification results derived from forensic laboratory analysis.

III. Petitioner Has Demonstrated A "Reasonable Possibility" Of Prejudice Under The *Chapman* Standard Of Review.

The Government argues that this case is a "poor vehicle" for review because Petitioner failed to make a Confrontation Clause objection at trial. In support of its argument, the Government asserts - without any analysis - that the applicable standard of review is the "plain-error standard." (Opp. at 13.)

The Government fails to recognize that if this Court rules in favor of the petitioner in *Melendez-Diaz*, then the admission of the laboratory reports in this case becomes error of constitutional proportion, and for such errors, the standard of review is harmless "beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The *Chapman* standard of review does not require a showing of actual prejudice, but merely "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23.

The Government cites to one inapposite case, *United States v. Olano*, 507 U.S. 725, 732 (1993). As an initial matter, *Olano* directly contradicts the Government's theory that Petitioner's failure to object at trial to DeFrancesco's testimony constituted a "waiver." 507 U.S. at 733 ("Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)."). Further, in *Olano*, the Court cited to *Arizona v. Fulminante*, 499 U.S. 279 (1991), which held that a legal error of constitutional proportion (a coerced confession) did not require a showing of actual prejudice. *Olano*, 507 U.S. at 735.

The Government's citation of *Olano* begs the question as to whether the admission of the laboratory results in this case without the testimony of Olson violated the Confrontation Clause, and thus was plain error of constitutional proportion.

In any event, the Government has failed to answer Petitioner's arguments that, here, there was a reasonable possibility of prejudice from the admission of Olson's conclusions. First, such "scientific evidence" can be conclusive for jurors. (Pet. Br. at 16-17.) Second, prejudice should be presumed because these conclusions were admitted in violation of Federal Rule of Evidence 703 and without a corrective jury instruction. (Pet. Br. at 17-18.) Third, there was actual prejudice in this case because it is "impossible for anyone to discern where Olson's conclusions end and DeFrancesco's independent judgment (if any) begins." (Pet. Br. at 18-19.)

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for writ of certiorari and set it for hearing on the same date as *Melendez-Diaz v. Massachusetts*, Docket No. 07-591, or in the alternative, hold it pending a decision in that case.

Respectfully submitted,

BARRY LEVENSTAM
Counsel of Record
SHORGE K. SATO
JENNER & BLOCK LLP
330 N. Wabash Ave.
Chicago, IL 60611
(312) 222-9350

Attorneys for Petitioner

July 17, 2008

APPENDIX

BEST AVAILABLE COPY

U.S. Department of Justice
Drug Enforcement Administration
North Central Laboratory

CHEMICAL ANALYSIS REPORT

To: Resident Agent in Charge
Merrillville Resident Office

Date: June 24, 2004

Attn: TFA Steve Lucas

Case Number: I5-00-0126

Analysis Summary and Remarks:

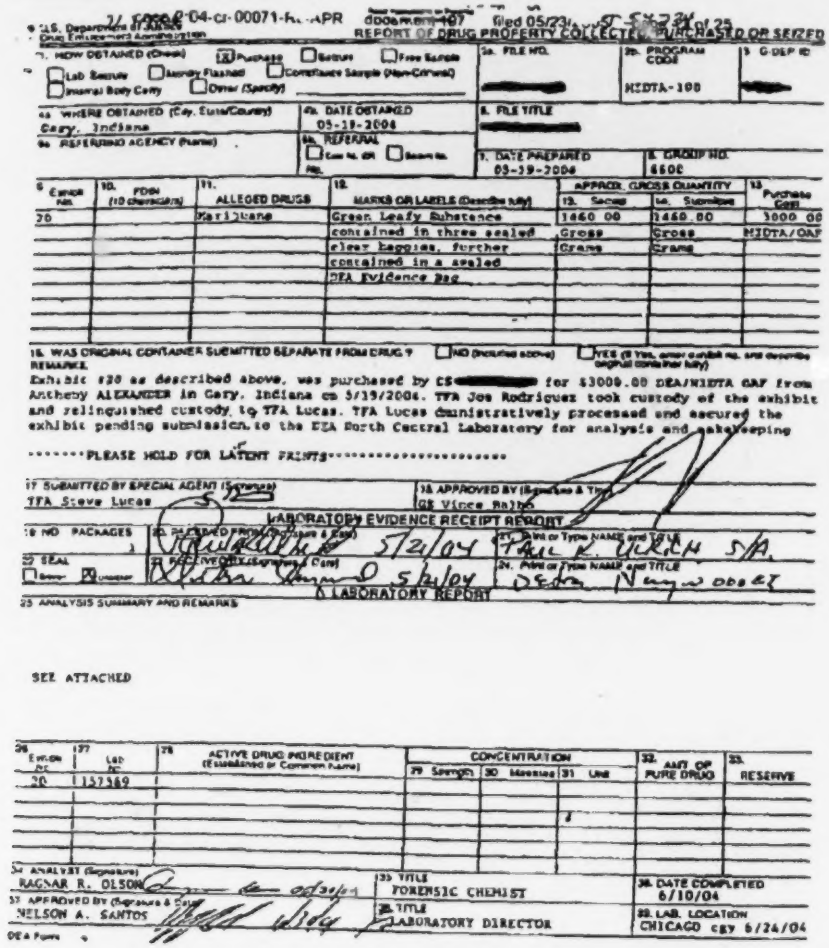
Laboratory No.: 157569
Exhibit 20 contains: Marijuana
Gross Wt.: 1455 grams (g)
Net Wt.: 1326 g
Active Drug Ingredient: Marijuana
Amount of Pure Drug: NA
Reserve Wt.: 1300 g

Note: Original packaging submitted to SFL #5 for fingerprint examination.
25.0 grams removed for special program.

Analyst Ragnar R. Olson
Forensic Chemist
Date Completed: 6/10/04

Approved by Nelson A. Santos
Laboratory Director
Laboratory Location: Chicago, IL-cgy

Prosecution / Org. Office / Laboratory / Hoqurs / ....Page 1 of 1



2:04-cr-00071-R... APR Document 107 Filed 05/23/... Page 1 of 25

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR SEIZED

7. HOW OBTAINED (Check) [X] Purchase [ ] Seizure [ ] Found [ ] Lab Sample [ ] Informer Flashed [ ] Controlled Sample (Non-Criminal) [ ] Informer Body Carry [ ] Other (Specify)

8a. FILE NO. [redacted]

8b. PROGRAM CODE: NIDTA-100

9. G-DEP ID [redacted]

8c. WHERE OBTAINED (City, State/Country): Gary, Indiana

8d. DATE OBTAINED: 05-19-2004

8e. REFERRING AGENCY (Name)

8f. REFERRAL [ ] Case No. OR [ ] Source No.

8. FILE TITLE [redacted]

7. DATE PREPARED: 05-19-2004

8. GROUP NO.: 4600

9. Exhibit No.	10. FDSN (10 characters)	11. ALLEGED DRUGS	12. MARKS OR LABELS (Describe fully)	APPROX. GROSS QUANTITY 13. Secure	14. Submitted	15. Purchase Cost
20		Marijuana	Green Leafy Substance	1460.00	1460.00	3000.00
			contained in three sealed	Gross	Gross	NIDTA/OAF
			clear baggies, further	Grams	Grams	
			contained in a sealed			
			DEA Evidence Bag			

16. WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? [ ] NO (Explain above) [ ] YES (If Yes, enter exhibit no. and describe original container fully)

REMARKS

Exhibit #20 as described above, was purchased by CS [redacted] for $3000.00 DEA/NIDTA OAF from Anthony ALEXANDER in Gary, Indiana on 5/19/2004. TFA Joe Rodriguez took custody of the exhibit and relinquished custody to TFA Lucas. TFA Lucas administratively processed and secured the exhibit pending submission to the DEA North Central Laboratory for analysis and safekeeping

.....PLEASE HOLD FOR LATENT PRINTS.....

17. SUBMITTED BY SPECIAL AGENT (Signature) TFA Steve Lucas

18. APPROVED BY (Signature & Title) GS Vince Ralph

LABORATORY EVIDENCE RECEIPT REPORT

19. NO. PACKAGES 1

20. SEAL [ ] Broken [X] Number

21. RECEIVED FROM (Signature & Date) 5/24/04

21. Name or Type NAME and TITLE PAUL K. ULRICH SA

22. RECEIVED BY (Signature & Date) 5/24/04

22. Print or Type NAME and TITLE Debra Nungaray DEA CI

LABORATORY REPORT

23. ANALYSIS SUMMARY AND REMARKS

SEE ATTACHED

26. Exhibit No.	27. Lab No.	28. ACTIVE DRUG INGREDIENT (Established or Common Name)	CONCENTRATION 29. Strength	30. Mixture	31. Unit	32. AMT OF PURE DRUG	33. RESERVE
20	1157369						

34. ANALYST (Signature) RAGNAR R. OLSON 6/10/04

35. TITLE FORENSIC CHEMIST

36. DATE COMPLETED 6/10/04

37. APPROVED BY (Signature & Date) NELSON A. SANTOS 6/24/04

38. TITLE LABORATORY DIRECTOR

39. LAB. LOCATION CHICAGO CGY 6/24/04

DEA Form

Moon & Alexander

U.S. Department of Justice
Drug Enforcement Administration
North Central Laboratory

CHEMICAL ANALYSIS REPORT

To: Resident Agent in Charge
Merrillville Resident Office

Date: July 8, 2004

Attn: SA Eric S. Lee

Case Number: IS-00-0126

Analysis Summary and Remarks:

Laboratory No.: 157744
Exhibit 21 contains: Cocaine Hydrochloride and Caffeine
Gross Wt.: 152.9 grams (g)
Net Wt.: 125.0 g
Active Drug Ingredient: Cocaine Hydrochloride – 71%
Amount of Pure Drug: 88.7 g
Reserve Wt.: 124.5 g

07/14/04
Analyst Ragnar R. Olson
Forensic Chemist
Date Completed 6/22/04

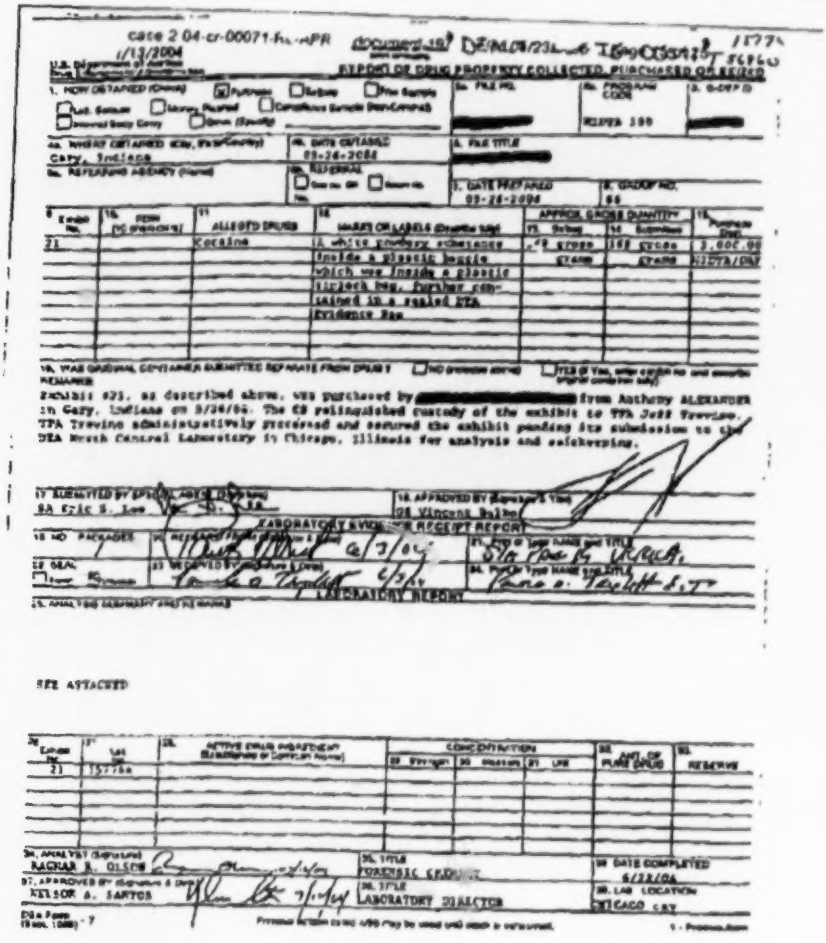
7/14/04
Approved by Nelson A. Santos
Laboratory Director
Laboratory Location: Chicago, Illinois

Prosecution / Orig. Office / Laboratory / Historical ..... Page 1 of 1

DEFENDANT'S EXHIBIT 11

Noon & Alexander

035



Case 2:04-cr-00071-[illegible]-PPR Document 18 Filed 07/23/04 Page 1 of 2 PageID #: 157
1/13/2004
U.S. Department of Justice
Drug Enforcement Administration
REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR RECEIVED

1. HOW OBTAINED (Check): Purchase; Seizure; Other Source; Evid. Sample; Lawfully Acquired; Surveillance Sample Destroyed; Unwanted Body Carry; Other (Specify)
2a. FILE NO. [redacted]
2b. PROGRAM CODE: KILPRO 300
2c. G-DEP ID [redacted]
3a. WHERE OBTAINED (City, State/Country): Gary, Indiana
3b. DATE OBTAINED: 03-24-2004
3c. REFERRING AGENCY (Name)
3d. REFERRAL: Direct; Indirect; No
4. FILE TITLE [redacted]
5. DATE PREPARED: 03-26-2004
6. GROUP NO.: 66

7 Exhibit No.	8a. ITEM (If Applicable)	9 ALLEGED DRUG	10 NAME OF LABELS (If other than DEA)	APPROX. GROSS QUANTITY 11a. Ordered	11b. Submitted	12. Packaging Code
Z1		Cocaine	A white powdery substance inside a plastic baggie which was inside a plastic ziplock bag, further contained in a sealed DEA Evidence Bag	1 KILOGRAM	1000 GRAMS	1.00E-03

11b. WAS ORIGINAL CONTAINER SUBMITTED AS MATE FROM DRUG? NO (If no, explain in REMARKS) YES (If Yes, enter code for and describe original container below)
REMARKS:
Exhibit #Z1, as described above, was purchased by [redacted] from Anthony ALEXANDER in Gary, Indiana on 3/24/04. The CS relinquished custody of the exhibit to TFA Jeff Trevino. TFA Trevino administratively processed and secured the exhibit pending its submission to the DEA North Central Laboratory in Chicago, Illinois for analysis and safekeeping.

13. SUBMITTED BY (Printed Name and Signature): SA Eric S. Lee
14. APPROVED BY (Signature & Title): [illegible]
15. APPROVED BY: Vincent Bailo
LABORATORY REVIEW AND ACCEPT REPORT
16. NO PACKAGES
17. RECEIVED (Signature & Date): 6/7/04
17. Type or Stamp Name and Title: DEA Forensic Chemist
18. SEAL: Yes; No
19. RECEIVED (Signature & Date): 6/7/04
20. Printed Name and Title: Irene D. Taylor, S.T.
LABORATORY REPORT
21. ANALYSIS PERFORMED BY (Print or Stamp Name)

SEE ATTACHED

22 Exhibit No.	23 Lab No.	24. ACTIVE DRUG INGREDIENT (If Applicable or Significant Amount)	CONCENTRATION 25 Percent	26 Dosage	27 Unit	28. AMT. OF FINAL DRUG	29. REMARKS
Z1	157766						

30. ANALYST (Signature): RACHAR R. OLSON
31. TITLE: FORENSIC CHEMIST
32. DATE COMPLETED: 6/23/04
33. APPROVED BY (Signature & Date): NELSON A. SANTOS
34. TITLE: LABORATORY DIRECTOR
35. LAB LOCATION: CHICAGO, ILL
DEA Form [illegible] (Rev. [illegible]) - 7
Previous editions to this form may be used until stock is exhausted.
1 - Processing Agency

Noon & Alexander

CHEMICAL ANALYSIS REPORT

To: Resident Agent in Charge
Mattoon Resident Office

Date: July 30, 200...

Attn: SA Eric S. Lee

Case Number: 15-00-0126

Analysis Summary and Remarks:

Laboratory No.: 357963
Exhibit 22 contains: Cocaine Base
Gross Wt.: 159.7 grams (g)
Net Wt.: 124.7 g
Active Drug Ingredient: Cocaine Base - 60%
Amount of Pure Drug: 74.8 g
Reserve Wt.: 124.2 g

Analyst Regina R. Olson
Forensic Chemist
Date Completed: 7/12/08

Approved by Nelson A. Santos
Laboratory Director
Laboratory Location: Chicago, IL - cgy

Prosecution / Org. Office / Laboratory / Hdqrs / .....Page 1 of 1

DEFENDANT'S EXHIBIT GG

Room 6 Alexander

037

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR SEIZED

1. HOW OBTAINED (Check) ☒ Purchase ☐ Seizure ☐ Found ☐ Abandoned ☐ Consensual Search (Non-Custodial) ☐ Lab. Sample ☐ Incident to Arrest ☐ Search Warrant ☐ Financial Body Carry ☐ Other (Specify)

2a. FILE NO. [redacted]
2b. PROGRAM CODE: WITTA 388
3. C-DOCKET NO. [redacted]

4a. WHERE OBTAINED (City, State/Country): Gary, Indiana
4b. DATE OBTAINED: 06-15-2006
5. FILE TITLE: [redacted]
6a. REFERRING AGENCY (Name)
6b. REFERRAL ☐ Direct, not ☐ Referred to
7. DATE PREPARED: 06-16-2006
8. CHECKED BY: GS

9. Exhibit No.	10. ITEM (If Applicable)	11. ALLEGED DRUGS	12. MARKS OR LABELS (Describe fully)	APPROX. GROSS QUANTITY 13a. Seized	13b. Submitted	14. Property Item No.
33		Crack Cocaine	An off-white rock-like substance inside (14) heated plastic baggies which were inside a ziploc plastic bag. Further contained in a sealed DEA Evidence Bag	139.6 grams	139.6 grams	52,508 PHYS ONLY

16. WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? ☒ NO (Explain above) ☐ YES (If Yes, were original ID and initials on bag?)

REMARKS:
Exhibit 33, as described above, was purchased by [redacted] from Anthony ALEXANDER in Gary, Indiana on 6/15/06. The CS relinquished custody of the exhibit to SA Eric Lee and TFA Jeff Trevino. TFA Trevino then administratively processed and secured the exhibit pending its submission to the DEA North Central Laboratory in Chicago, Illinois for analysis and safekeeping.

17. SUBMITTED BY (Typed name, agency, signature): SA Eric S. Lee
18. RECEIVED BY (Typed name, agency, signature): GS Vincent Balog

LABORATORY EVIDENCE RECEIPT REPORT

19. NO. PACKAGES: 1
20. RECEIVED FROM (Typed name, agency, signature)
21. RECEIVED BY (Typed name, agency, signature)
22. Typed name and title
23. Typed name and title

LABORATORY REPORT

24. ANALYSIS, FINDINGS AND REMARKS

SEE ATTACHED

25. Exhibit No.	26. Lab No.	27. ACTIVE DRUG INGREDIENT (Name/Strength or Common Name)	CONCENTRATION 28. Strength	29. Tolerance (+/-)	30. Unit	31. AMT. OF PURE DRUG	32. RESERVE
33	157867						

33. ANALYST (Signature): [signature] 07/12/06
34. TITLE: FORENSIC CHEMIST
35. DATE COMPLETED: 7/13/06
36. APPROVED BY (Signature & Date): [signature]
37. TITLE: LABORATORY DIRECTOR
38. LAB LOCATION: CHICAGO CEN

DEA Form 7 (Rev. 1-96)

1 - Property

Mock & Alexander

Drug Enforcement Administration
North Central Laboratory

CHEMICAL ANALYSIS REPORT

To: Resident Agent in Charge
Merrillville Resident Office

Date: July 20, 2004

Attn: TFA Jeff Trevino

Case Number: 15-00-0126

Analysis Summary and Remarks:

Laboratory No.: 158070
Exhibit 24 contains: Cocaine Hydrochloride and Procaine Hydrochloride
Gross Wt.: 281.6 grams (g)
Net Wt.: 238.7 g
Active Drug Ingredient: Cocaine Hydrochloride - 16 %
Amount of Pure Drug: 38.1 g
Reserve Wt.: 237.9 g

Analyst Ragnar R. Olson
Forensic Chemist
Date Completed: 7/16/04

Approved by Nelson A. Santos
Laboratory Director
Laboratory Location: Chicago, IL - cgy

Prosecution / Orig. Office / Laboratory / Hdqtrs / .....Page 1 of 1

DEFENDANT'S EXHIBIT

Moon & Alexander

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2/27/2006 2:04-cr-00071-RL-APR document 197 filed 05/23/06 page 19 of 28 - IS-0021

U.S. Department of Justice — Drug Enforcement Administration

DEA — REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR SEIZED

HOW OBTAINED (Check): [X] Purchase; [ ] Seizure; [ ] Found Sample; [ ] Lab. Sample; [ ] Money Laundered; [ ] Surveillance Sample (Non-Criminal); [ ] Informal Body Carry; [ ] Other (Specify)	2a. FILE NO. [redacted]	2b. PROGRAM CODE: HIDTA-100	3. G DEP ID: [redacted]
4a. WHERE OBTAINED (City, State/Country): Gary, Indiana	4b. DATE OBTAINED: 06-24-2004	5. FILE TITLE: [redacted]	
6a. REFERRING AGENCY (Name):	6b. REFERRAL: [ ] Case No. OR [ ] Seizure No.:	7. DATE PREPARED: 06-24-2004	8. GROUP NO.: 66

9. Exhibit No.	10. FDRN (10 characters)	11. ALLEGED DRUGS	12. MARKS OR LABELS (Describe fully)	APPROX GROSS QUANTITY 13. Seized	APPROX GROSS QUANTITY 14. Submitted	15. Purchase Cost
24		Cocaine	A white powdery substance inside a clear plastic baggie, contained in brown paper bag, further contained in a sealed DEA evidence bag	281.0 Gross Grams	281.0 Gross Grams	$6,000.00 HIDTA/OAT

16. WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? [ ] NO (Explained above) [ ] YES (If Yes, enter exhibit no. and describe original container fully)

REMARKS:

Exhibit #24, as described above, was purchased by CS-[redacted] from Anthony ALEXANDER in Gary, Indiana on 6/24/2006. The CS relinquished custody of the exhibit to TFA Jeff Trevino. TFA Trevino administratively processed and secured the exhibit pending its submission to the DEA North Central Laboratory for analysis and safekeeping.

17. SUBMITTED BY SPECIAL AGENT (Signature): TFA Jeff Trevino — 18. APPROVED BY (Signature & Title): GS Vince Balbo

LABORATORY EVIDENCE RECEIPT REPORT

19. NO. PACKAGES: 1	20. RECEIVED BY (Signature & Date): 6/25/04	21. Printed Type NAME and TITLE: MARK R ULRICH SA
22. SEAL: [ ] Broken [X] Intact	23. RELEASED BY (Signature & Date): 6/25/04	24. Printed Type NAME and TITLE: Pamela A Taylor CT

LABORATORY REPORT

25. ANALYSIS SUMMARY AND REMARKS

SEE ATTACHED

26. Exhibit No.	27. Lab No.	28. ACTIVE DRUG INGREDIENT (Established or Common Name)	CONCENTRATION 29. Strength	30. Measure	31. Unit	32. AMT OF PURE DRUG	33. RESERVE
24	556070						

34. ANALYST (Signature): RAGNAR R. OLSON — 35. TITLE: FORENSIC CHEMIST — 36. DATE COMPLETED: 7-16-04

37. APPROVED BY (Signature & Date): NELSON A. SANTOS — 38. TITLE: LABORATORY DIRECTOR — 39. LAB LOCATION: CHICAGO FSL

Moon & Alexander

Department of Justice
Drug Enforcement Administration
North Central Laboratory

CHEMICAL ANALYSIS REPORT

To: Resident Agent in Charge
Merrillville Resident Office

Date: September 15, 2004

Attn: TFA Jeff Trevino

Case Number: I5-00-0126

Analysis Summary and Remarks:

Laboratory No.: 139059
Exhibit 28 contains: Cocaine Hydrochloride, Lidocaine (salt undetermined), and Procaine (salt undetermined)
Gross Wt.: 550.3 grams (g)
Net Wt.: 492.9 g
Active Drug Ingredient: Cocaine Hydrochloride – 25%
Amount of Pure Drug: 123.2 g
Reserve Wt.: 492.0 g

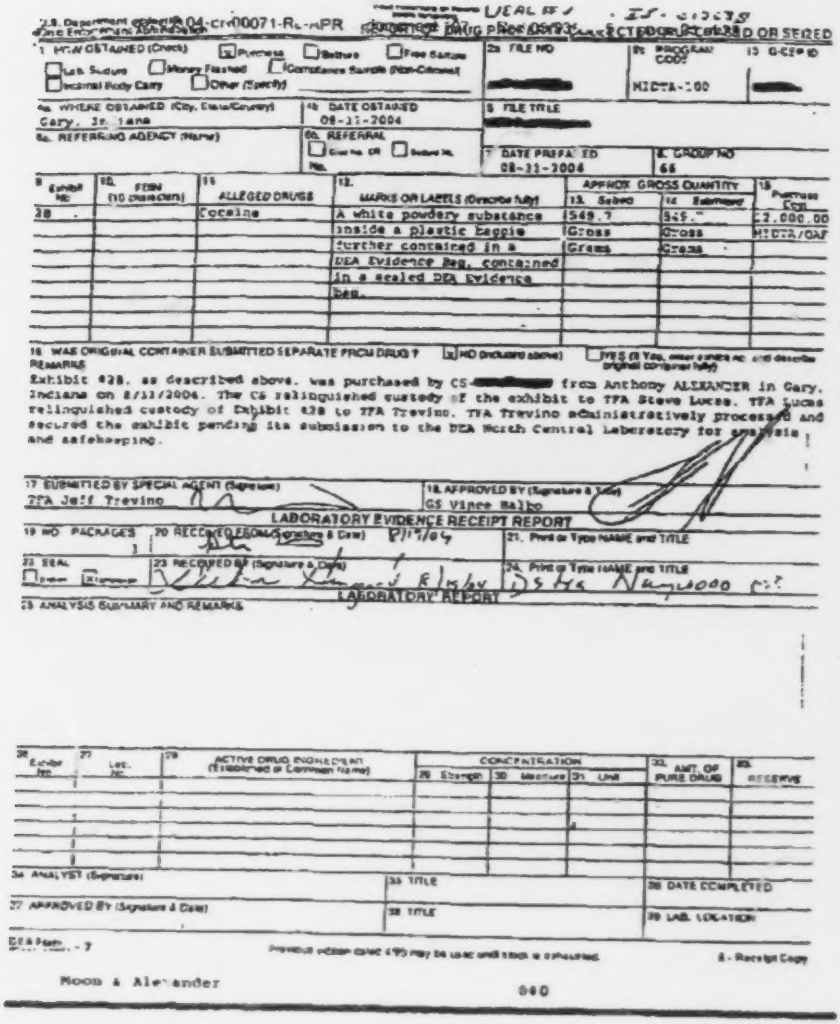
09/15/04
Analyst Ragini R. Chen
Forensic Chemist
Date Completed: 09/09/04

Approved by Nelson A. Santos
Laboratory Director
Laboratory Location: Chicago, IL-alt

Prosecution / Orig. Office / Laboratory / Judge / .....Page 1 of 3

DEFENDANT'S EXHIBIT

Hcen & Alexander



2a. Department ofJustice 1:04-cr-00071-RLY-MPR Document 270 Filed 05/23/ SEIZED OR SEIZED

1. HOW OBTAINED (Check) [X] Purchase [ ] Seizure [ ] Found [ ] Sub. Seizure [ ] Money Passed [ ] Surveillance Sample (Non-Criminal) [ ] Incidental Body Carry [ ] Other (Specify)

2a. FILE NO [redacted] | 2b. PROGRAM CODE: HIDTA-100 | 3. GROUP ID [redacted]

4a. WHERE OBTAINED (City, State/Country): Gary, In. Iana | 4b. DATE OBTAINED: 08-11-2004 | 5. FILE TITLE [redacted]

6a. REFERRING AGENCY (Name) | 6b. REFERRAL [ ] Source Off [ ] Source No. | 7. DATE PREPARED: 08-11-2004 | 8. GROUP NO: 66

9. Exhibit No.	10. FDIN (10 characters)	11. ALLEGED DRUGS	12. MARKS OR LABELS (Describe fully)	APPROX. GROSS QUANTITY 13. Submit	14. Estimated	15. Purchase Cost
2B		Cocaine	A white powdery substance	549.7	549."	$2,000.00
			inside a plastic baggie	Gross	Gross	HIDTA/OAF
			further contained in a	Grams	Grams	
			DEA Evidence Bag, contained			
			in a sealed DEA Evidence			
			Bag.			

16. WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? [X] NO (Included above) [ ] YES (If Yes, enter owner's no. and describe original container fully)

REMARKS

Exhibit #2B, as described above, was purchased by CS-[redacted] from Anthony ALEXANDER in Gary, Indiana on 8/11/2004. The CS relinquished custody of the exhibit to TFA Steve Lucas. TFA Lucas relinquished custody of Exhibit #2B to TFA Trevino. TFA Trevino administratively processed and secured the exhibit pending its submission to the DEA North Central Laboratory for analysis and safekeeping.

17. SUBMITTED BY SPECIAL AGENT (Signature): TFA Jeff Trevino | 18. APPROVED BY (Signature & Title): GS Vince Balko

LABORATORY EVIDENCE RECEIPT REPORT

19. NO. PACKAGES: 1 | 20. RECEIVED FROM (Signature & Date): 8/11/04 | 21. Print or Type NAME and TITLE

22. SEAL [ ] Open [X] Intact | 23. RECEIVED BY (Signature & Date) | 24. Print or Type NAME and TITLE: DEA Manager

LABORATORY REPORT

25. ANALYSIS SUMMARY AND REMARKS

26. Exhibit No.	27. Lot No.	28. ACTIVE DRUG INGREDIENT (Established or Common Name)	CONCENTRATION 29. Strength	30. Measure	31. Unit	32. AMT. OF PURE DRUG	33. RESERVE

34. ANALYST (Signature) | 35. TITLE | 36. DATE COMPLETED

37. APPROVED BY (Signature & Date) | 38. TITLE | 39. LAB. LOCATION

DEA Form ... - 7 (Previous edition dated 4-75 may be used until stock is exhausted.) 8 - Receipt Copy

Moon & Alexander